CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 133

THOS. A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.

vs.

J. L. RICHARDSON

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED JUNE 6, 1929

(34,264)

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INDEX

	Page
Certificate from the United States circuit court of appeals, fourth circuit	1
Statement of facts	1
Question certified	3
Judges' signatures	3
Clerk's certificate	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1929

United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 2733.

THOMAS A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.,
PLAINTIFF-APPELLANT.

versus

J. L. RICHARDSON, DEFENDANT-APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT FLORENCE.

QUESTION CERTIFIED TO THE SUPREME COURT OF THE UNITED STATES BY THE CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT ON THE CASE STATED.

Statement of Facts.

The case came into this court on appeal from the District Court of the United States for the Eastern District of South Carolina. A bill of complaint was filed in the District Court by the receiver of the Farmers and

Merchants National Bank of Lake City, South Carolina, against J. L. Richardson to recover the sum of $1,900 with interest, representing an assessment of $100 per share upon 19 shares of the capital stock of the Bank ordered by the Comptroller of the Currency, by reason of the insufficiency of the assets of the Bank to pay its depositors and other creditors. The answer of the defendant denies ownership of the stock, and on that ground resists payment of the assessment. The evidence shows that on November 18, 1925, the defendant Richardson purchased 10 shares of stock and received the stock certificate endorsed in blank by the seller. Then, in order to give the stock to his minor son, he took the certificate to the banking house and delivered it to the Bank with verbal instructions to register the stock and issue a new certificate in his son's name. This was accordingly done, the Bank retaining the new certificate in its custody. Similarly, on January 16, 1926, the defendant purchased 6 additional shares and had them registered in the name of his son. Again, on May 18, 1926, the defendant bought an additional lot of 3 shares and caused them to be registered as a gift in the name of his minor daughter. It is conceded that these transfers were made by the defendant to his children in good faith, without knowledge of the failing condition of the Bank, and without intent on his part to avoid the stockholder's liability. The Bank was closed by the Comptroller of the Currency on account of insolvency on October 9, 1926, and subsequently the receiver was appointed. At the conclusion of the evidence, both parties asked the court for binding instructions whereupon the court instructed the jury to find a verdict for the defendant.

Being divided and in doubt, this court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following question of law, the determination of which is indispensable to a proper decision of the case:

Question.

Is one, who purchases shares of stock of a national bank, liable for an assessment subsequently imposed by the Comptroller of the Currency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?

EDMUND WADDILL, JR.,
United States Circuit Judge.

ELLIOTT NORTHCOTT,
United States Circuit Judge.

MORRIS A. SOPER,
United States District Judge.

Richmond, Va., May 24, 1929.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, } *ss*:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the question of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on this 31st day of May, A. D. 1929.

{Seal of Court}

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

FILE COPY

DEC 26

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 133

THOS. A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.,

vs.

J. L. RICHARDSON.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RECEIVER.

R. E. WHITING,
D. E. ELLERBE,
Attorneys for Receiver.

INDEX.

Subject Index.

	Page
Statement of case	1
Argument	3
Summary of argument	3
Supporting citations	3
Brief of authorities	4
I. Preliminary considerations	4
II. Both lack of assent and legal incapacity on the part of the infants to receive the gift of bank stock burdened with the liability for assessment.	9
(*a*) General authorities	10
(*b*) Federal cases	15
(*c*) English cases	20
Conclusion	22
Appendix	25
The appellee's positions on argument before the Circuit Court of Appeals	25

Cases Cited.

Adams v. Johnson (Bowden v. Johnson), 107 U. S., 251; 27 L. Ed., 386	23
Aldrich v. Bingham, 131 Fed., 363	3, 15, 16, 23
Castleman v. Holmes, 4 J. J. Marshall's Rep. (Ky.), 1	4
Cobre Mining Company (Weston's Case), L. R., 5 Ch. App., 614.	20
De Levillain v. Evans, 39 Cal., 120	8, 10
Eschen v. Steers, 10 F. (2d), 739	29
First National Bank v. Hawkins, 174 U. S., 364; 43 L. Ed., 1007	23
Foster v. Chase, 75 Fed., 797	3
Foster v. Lincoln's Ex'r, 79 Fed., 170, 172	15, 24
Fowler v. Gowing, 152 Fed., 801	26
Houghton v. Hubbell, 91 Fed., 453	5
Johnston v. Laflin, 103 U. S., 800, 803; 26 L. Ed., 532	4, 7, 17, 20, 25
Johnston v. Laflin, 5 Dillon's Circuit Court Reports, Fed. Cas. No. 7393	4, 10, 17, 23
Kerr v. Urie, 8 Md., 72; 38 L. R. A., 119; 63 Am. St. Rep., 493	4, 14

Page

Keyser v. Hitz, 133 U. S., 138; 33 L. Ed., 531..... 4, 9, 15
Lantry v. Wallace, 182 U. S., 536; 45 L. Ed., 1218..... 22
Man v. Boykin, 79 S. C., 1; 60 S. E., 17..... 25
Matteson v. Dent, 176 U. S., 521; 44 L. Ed., 571..... 9
McDonald v. Dewey, 202 U. S., 510; 50 L. Ed., 1128..... 20
Pauly v. Trust Co., 165 U. S., 606, 619; 41 L. Ed., 844, 849.. 5, 10
Richmond v. Irons, 121 U. S., 27; 30 L. Ed., 864..... 9
Richardson's Case, L. R., 19 Eq., 588; 32 L. T. (N. S.), 18..... 4, 22
Roman v. Fry, 5 J. J. Marshall's Reports (Ky.), 634..... 4, 14
Ruchizky v. De Haven, 97 Pa. St., 202..... 4, 13
Scott v. Deweese, 181 U. S., 202; 45 L. Ed., 822..... 22
Stone v. Hackett, 12 Gray (Mass.), 227..... 28, 29
Stowe v. Harvey, 241 U. S., 199; 60 L. Ed., 952..... 7
Strong v. Weir, 47 S. C., 322..... 28
Wehby v. Spurway (Ariz.), 246 P., 759, certiorari denied 273 U. S., 722; 71 L. Ed., 858..... 22
Weston's Case, L. R., 5 Ch. App., 614..... 3, 17
Williams v. Cobb, 219 Fed., 663; 242 U. S., 307..... 28
Williams v. Vreeland, 250 U. S., 295, 299; 63 L. Ed., 989.... 9, 10

TEXTBOOKS CITED.

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28 C. J., 643, 644..... 7
31 C. J., 1024..... 10
14 C. J., 1014..... 11
Fletcher's Cyclopedia of Corporations, Secvs. 4187, 4203..... 4, 13
Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 997..... 29, 30
Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 1149..... 7
Thompson on Corporations (3d Ed.), Secs. 4043, 4459, 4900.. 4, 11, 12

SUPREME COURT OF THE UNITED STATES.

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No. 133

THOS. A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.,

vs.

J. L. RICHARDSON.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RECEIVER.

Statement of Case.

The Circuit Court of Appeals for the Fourth Circuit has certified to this Court the following question:

> "Is one who purchases shares of stock of a national bank liable for an assessment subsequently imposed by the Comptroller of the Cur-

rency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser, with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?''

In the statement preceding the certified question, it appears that Richardson, the defendant, purchased ten shares of bank stock of the Farmers & Merchants National Bank of Lake City, S. C., on November 18, 1925; six shares on January 10, 1926, and three shares on May 18, 1926. The bank was closed on account of insolvency on October 9, 1926. The defendant purchased the shares with his own money and took the certificates, endorsed in blank, into his own keeping. Between the time of purchase and the time of surrender to the registry officer of the bank the shares were in his possession, under his control, and he had taken on himself neither charge nor duty, legal or moral, to make his intended gift of the stock to his children. This intention was declared only when he took the certificates to the banking-house and surrendered them to the registry officer of the bank.

It is conceded that the defendant did not have knowledge of the failing condition of the bank; for, if he had, it is most unlikely that he would have bought the stock; but it is, nevertheless, a matter of fair inference, of which the Court may properly take cognizance, that the great number of bank failures over the entire country, particularly in South Carolina, continuing over a period of almost five years, would naturally incline the purchaser of bank stock, even if he did not have knowledge of the failing condition of the bank, to risk the investment for his children rather than for himself, if they, because of their infancy, could enjoy the benefits accruing to shareholders and escape liability if the bank should fail.

ARGUMENT.

Summary of Argument.

A judgment should have been awarded the receiver for the entire amount of the stock assessment, as the defendant purchased such stock from the former shareholders, paid his own money, and personally received delivery of the certificates, which were endorsed in blank; and his gift of the stock to the infant transferees, being burdensome to the infants, since it was subject to the liability for the statutory assessment, should be treated, as a matter of law, as being ineffective to relieve the defendant from his liability for the assessment.

Supporting Citations.

Foster *v.* Chase, 75 Fed. 797; Aldrich *v.* Bingham, 131 Fed. 363; Weston's Case, L. R. 5 Ch. App. 614;

Richardson's Case, L. R. 19 Eq. 588; Castleman *v.* Holmes, 4 J. J. Marshall's Rep. (Ky.) 1; Roman *v.* Fry, 5 J. J. Marshall's Rep. (Ky.) 634; Kerr *v.* Urie, 86 Md. 72; 38 L. R. A. 119; 63 Am. St. Rep. 493; Ruchizky *v.* DeHaven, 97 Pa. St. 202; Thompson on Corporations (3rd Ed.), sections 4043, 4900; Cook on Corporations (7th Ed.), section 250; Fletcher's Cyclopedia of Corporations, sections 4187, 4203. See, particularly, Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, and following note: Decision affirmed in Johnston *v.* Laflin, 103 U. S. 800; 26 L. Ed. 532.

Brief of Authorities.

I.

Preliminary considerations affecting the question involved in this appeal are as follows:

(1) LIABILITY FOR ASSESSMENT IS STATUTORY AND ATTACHES AS A LEGAL INCIDENT TO THE OWNERSHIP OF BANK STOCK.

> "The only persons holding shares of national bank stock whom the statute exempts from this responsibility are executors, administrators, guardians and trustees. Section 5152. **It is not for the courts, by mere construction to recognize an exemption which congress has not given.**" Keyser *v.* Hitz, 133 U. S. 138; 33 L. Ed. 531.
>
> "Such statutory liability was created for the protection of creditors and in order to strengthen the bank in the confidence of the public * * * **and the right of the receiver to maintain this action depends upon, and has its sanction in,**

> **the statute creating liability against each shareholder in whatever way he may have become such.** * * * The statute, in effect, says to all who become owners of national bank stock, no matter in what way they became shareholders, that **they cannot enjoy the benefits accruing to shareholders, and escape liability** for the contracts, debts and engagements of the bank. In other words the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders—**executors, administrators, guardians or trustees only being exempted from individual liability.**" Christopher *v.* Norvell, 201 U. S. 216; 50 L. E. 732.

(2) THE REAL OWNER OF NATIONAL BANK STOCK IS LIABLE EVEN IF THE STOCK IS NOT REGISTERED IN HIS NAME.

In Pauly *v.* Trust Co., 165 U. S. 606, 41 L. Ed. 844, 849, Mr. Justice Harlan, after analyzing the prior cases relating to the liability of shareholders in national banking association, states the rule deducible therefrom and, among other things, says that—

> "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of the U. S. Rev. St., Sec. 5151."

In Houghton *v.* Hubbell, 91 Fed. 453 (C. C. A., 1st Circuit), the syllabus shows an illustration of the application of the above-stated rule, as follows:

> "The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency and the receiver may bring an action at law for the collection of such assessment directly against him without regard to the liability of the agent."

In holding that the form of registration might be disregarded and the suit brought directly against the real owner of the shares, the Court said:

> "In doing as in this case, the Comptroller elected the more equitable of the legal remedits, and the one which sensibly avoided circuity of action and unnecessary litigation, by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall."

(3.) As between the transferrer and the transferee the transfer of shares is completed when the certificate of the stock is delivered, endorsed in blank, to a person competent to purchase and hold them.

> "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank. * * * But as between the

parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price paid. * * * The subsequent filling up of the blank by him (the purchaser) with another name instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transactions." Johnston *v.* Laflin, 103 U. S. 800, 803; 26 L. Ed. 532.

See, also:

Stowe *v.* Harvey, 241 U. S. 199, 60 L. Ed. 952.

(4.) A GIFT BECOMES COMPLETE ONLY WHEN ACCEPTED BY THE DONEE. A GIFT MADE TO AN INFANT, EVEN IF ACCEPTED, IS SUBJECT TO REPUDIATION WHERE A BURDEN ATTACHES TO THE DONATION.

"As a delivery is necessary, it follows, as a further requisite to a valid donation, that the donee must accept it. Such acceptance, however, will be presumed when the gift is for his advantage, in the absence of all contrary evidence." Pomeroy's Equity Jurisprudence (4th Ed.), section 1149, vol. 3, pages 2665, 2668.

"An unmistakable and unconditional acceptance on the part of the donee is an essential element to the validity of a gift *inter vivos*. * * * A gift of property to a person without his knowledge, if made in proper form, vests the property in him at once subject to his right to repudiate it when informed thereof." 28 *C. J.* 643, 644.

"It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation, the law does not force it upon him against his will. This must be so upon every principle of reason and justice. * * * In the case of a minor who is presumed in law to be incapable of exercising a sound discretion over his affairs and is, therefore, not bound by his contracts, unless in exceptional cases, there is the greater reason for presuming that he has accepted what is for his advantage. In other words, if it is for his advantage, the law accepts it for him and will hold the donor bound; but, if not for his advantage, the law will repudiate it at the instance of the minor, even though he may in terms have accepted it." Delevillain *v.* Evans, 39 Cal. 120.

(5.) THE ACCEPTANCE OF BANK STOCK TRANSFERRED ON THE BOOKS OF THE BANK WILL NOT BE PRESUMED, AND THE LIABILITY OF OWNERSHIP OF THE STOCK DOES NOT ATTACH WHERE THE TRANSFER IS MADE WITHOUT THE CONSENT AND KNOWLEDGE OF THE TRANSFEREE.

"Under the national banking act the individual liability of the stockholder is an essential element of the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. * * * Its obligation becomes a part of every contract, debt or engagement of the bank itself, as much so as if they were made directly by the stockholder

instead of by the corporation." Richmond *v.* Irons, 12 U. S. 27; 30 L. Ed. 864; Matteson *v.* Dent, 176 U. S. 521; 44 L. Ed. 571.

"In Keyser *v.* Hitz, 133 U. S. 138, which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this Court approved a charge: '**If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of defendant, without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer.**' And it was further said: 'We must not be understood as saying that the mere transfer of the stock on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank.' " Williams *v.* Vreeland, 250 U. S. 295, 299; 63 L. Ed. 989.

II

There was both lack of assent and legal incapacity on the part of the infants to receive the gift of bank stock burdened with the liability for assessment.

The defendant's money purchased the stock and the certificates assigned in blank were delivered to him

personally. As between the sellers of the stock and the defendant the transaction was complete when the stock was delivered. Title to the certificates passed to the defendant. His liability for the stock assessment did not depend on the registration of the stock in his name. Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, Fed. Cas. No. 7393; affirmed 103 U. S. 800; 26 L. Ed. 532. Nor could registration of these shares in the name of his infant children relieve the defendant from liability for the assessment where the transfer was the unauthorized act of the defendant. Pauly *v.* Trust Co., 165 U. S. 606; 41 L. Ed. 844. He could not, merely by placing the stock in the names of his children, subject them to the burden of stock assessment that is a legal incident of ownership. Williams *v.* Vreeland, 250 U. S. 295; 63 L. Ed. 989. There is not even the suggestion that either of the children had agreed to the transfers or that they knew, when the bank closed because of insolvency, that the stock had been placed in their names. Under such circumstances, regardless of any question of capacity to assume the obligation, they could not be held chargeable with liability for the ownership of the stock. As infants they were, moreover, under a legal incapacity which would be controlling against the presumption of acceptance of the gift. 31 *C. J.* 1024; DeLevillain *v.* Evans, 39 Cal. 120.

GENERAL AUTHORITIES.

"Under a well understood rule a tranfer of shares to an infant is not void, but is voidable

in the sense that the tranfer may be rejected by the directors, and avoided by the infant within a reasonable time after attaining his majority, so as to relieve himself from liability to creditors for debts of the corporation." 14 *C. J.* 1014.

In Cook on Corporations (7th Ed.), section 250, it is said:

"* * * And any person subscribing for shares in the name of an infant renders himself personally liable thereon. * * * So, likewise, when shares are assigned or transferred to infants as a contrivance to escape liability, the transferrer remains liable. **And this is the rule as to an infant transferee, although the transfer was bona fide, and even in ignorance of the infancy of the transferee.**"

Also, in section 396 (same work), it is declared:

"If the tranferee of a certificate of stock is an infant or person of unsound mind, the corporation may refuse to register such transferee as a stockholder. The reason of the rule is that such persons would not be obliged at law to respond to the obligations of a stockholder, and consequently are not entitled to its privileges."

In Thompson on Corporations (3rd Ed.), section 4459, it is said:

"It is the rule, too, that a transfer to an incompetent person, that is, a person who by reason of infancy or coverture is not competent to discharge the duties and to assume the lia-

> bilities of a stockholder, will not relieve the transferrer from liability. * * * A transfer to an infant will not relieve the transferrer from liability unless the infant has reached his majority and ratified the transfer."

In section 4043 (same work), the rule is stated:

> "In the absence of any qualifying statutory provisions on the subject, the contract of an infant to take shares of stock is the same as any other contract made by or for the infant with reference to ordinary personalty. Such contracts are generally held voidable at the election of the infant on attaining his majority, but not void. * * * The rights of the parties are reciprocal and **a contract for the sale of stock by the corporation to an infant may be avoided by the corporation or its representative at any time before ratification by the infant after attaining his majority.** Hence, if the corporation is wound up before such action by the corporation, **the person who had purchased the shares for the infant * * * may be held liable, since it will not be assumed that the infant would ratify the transaction when the time came for him to make his election.**"

Also, in section 4900 (same work), it is declared:

> "Under theories already pointed out, a subscriber or a purchaser of stock who takes the same in the name of a person who is *non sui juris* is subject to these statutory liabilities. **This rule applies especially where the stock is taken in the name of an infant.**"

A like statement appears in Fletcher's Cyclopedia of the Law of Private Corporations, section 4187:

> "**One who purchases or subscribes for stock in the name of an infant becomes himself liable as a stockholder to creditors of the corporation,** and his liability is not affected by the fact that, after the insolvency of the corporation and an assessment against him, but before an action is commenced by the receiver to collect the assessment, the infant becomes of age, and affirms the subscription or purchase."

Also, in section 4203 (same work), it is stated:

> "In order to relieve the tranferrer from his statutory liability or from liability for the balance due on his stock, **the tranfer must not only be made to a person legally capable of holding the stock transferred, but also to one who is legally capable of assuming the obligations of a stockholder, and who is not at liberty to repudiate them.** So a person who transfers stock to an infant will remain liable to creditors unless the infant has in the meantime attained his majority and ratified the transfer, even **though the corporation was solvent when the transfer was made.**"

In Ruchizky *v.* DeHaven, 97 Pa. St. 202, cited in footnote to section 250, Cook on Corporations (7th Ed.), it was held that a broker purchasing shares for the account of an infant was held liable as holder of the stock, not even his broker's agency protecting him. The reason of the decision was:

> "Ruchizky was a minor, and hence was entitled to legal protection and guardianship. It

> is said they knew not that he was a minor; but what does that matter? He was, nevertheless, an infant and their want of knowledge did not make him *sui juris.*"

In Kerr *v.* Urie, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493, it was said:

> "If persons were allowed to subscribe for stock in a national bank or in any other corporation where a personal liability attaches, either as attorney for an unnamed principal, as self-appointed trustee for some unnamed *cestui que trust,* or as attorney for an unnamed infant of tender years, and, when called upon to pay the debts of the bank to the extent of the stock so subscribed, could escape by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations which are found in great numbers in every state would be deprived of the only certain means provided by law for the payment of their claims. **But in addition to this, it is well settled upon authority that one assuming to act as Mrs. Urie has acted becomes personally bound. The infant not being liable, liability attaches to the person who makes the subscription, and if that person has transferred the stock to one capable of using and holding it, the liability passes on to the latter. Cook on Stock and Stockholders, Sec. 67.**"

Also, in Roman *v.* Fry, 5 J. J. Marshall's Reports (Ky.) 634, the Court said:

> "If Dallam were permitted to escape by taking stock in the names of infant children, the

whole object of the charter in securing the community against the insolvency of the corporation might be defeated. We cannot suffer it to be done. Such a thing would be a fraud on the community. We see no good reason why the Court should have opened the decree to receive the supplemental answer of Dallam."

FEDERAL CASES.

The two federal cases usually cited are both District Court cases—Foster *v.* Chase, 75 Fed. 797, District of Vermont, Wheeler, District Judge; and Aldrich *v.* Bingham, 131 Fed. 363, Western District of New York, Hazel, District Judge. The ruling in each of these cases is that the father is responsible for the stock assessment.

In Foster *v.* Chase, Judge Wheeler said:

"The plaintiff claims that the defendant made himself liable for the assessment because of the incapacity of the children to take the stock and make themselves liable for it. He insists that they only are the shareholders, and liable, if anyone is. Assent is necessary to becoming a shareholder, subject to this liability, in a national bank. Keyser *v.* Hitz, 133 U. S. 138. Minors do not seem to have anywhere the necessary legal capacity for that. The principles upon which this disability rests are elementary and universal. In buying and paying for this stock, and having it placed on the books of the bank, the defendant acted for himself; in having it placed there in the names of his children, as with their assent, he assumed to act for them.

> As they could not themselves so assent as to be bound to the liabilities of a shareholder, they could not so authorize him to assent for them as to bind them. To the extent that they could not be bound, he acted without legal authority, and bound only himself."

In Aldrich *v.* Bingham, Judge Hazel also said:

> "It is a well established rule of law that a transfer of stock in a corporation must be made to a person or corporation not only legally capable of holding the stock transferred, but also to one who is legally bound to respond when assessments are made upon the stock, and who may lawfully assume the liabilities of the transferrer in relation thereto. It need not necessarily have been transferred to a person who is responsible in the sense that he will be able to financially meet the liabilities imposed upon a stockholder, **but it is essential that he shall be legally liable to assume such obligations, and not be at liberty to repudiate them.** Upon this point the cases collated at the end of the opinion in Johnston *v.* Laflin, Fed. Cas. No. 7, 393, which involve the liability of the transferrer of stock in a national bank, are instructive.

The résumé follows:

> " 'An infant cannot become purchaser and transferee of shares so as to relieve the transferrer of liability as a shareholder (Nickalls *v.* Merry, L. R. 7 H. L. 530), even though the transfer to the infant be registered (Symon's Case, 5 Ch. App. 298; Weston's Case, Id. 614). * * * The original shareholder remains a shareholder, even in cases where he is entirely innocent of

the transaction, and not aware that the shares were being transferred to an infant, Lord Chancellor Hatherly, Weston's Case, 5 Ch. App. 614, 620.'

"The principle of law announced in Johnston *v.* Laflin, to the effect that an infant cannot become purchaser and transferee of shares so as to relieve the transferrer of liability as a shareholder has been many times approved, and is applicable to this case. Cook on Stock and Stockholders & Corporation Law, Sec. 250. * * * It is insisted that the bank acquiesced in this transfer by the defendant, and recorded the same in its corporate stock book; that such transfer is voidable, and not void, at the election of the infant when he reaches full age. The soundness of this contention is not debatable, nor indeed, is it denied that generally it will not be presumed that an infant will seek to avoid his obligation because of his infancy. * * * These propositions have little relevancy, conceding, as we must, that **the liability of the shareholder in a national bank is not contractual, but rests on a statutory liability which the executive officers of a national bank cannot waive. * * * The law properly imposes upon shareholders in a national bank a conditional liability as a protection and shield to depositors and general creditors. That protection cannot be removed by sales and transfer of stock to infants and other purchasers who cannot legally contract to accept the same.**"

The case of Johnston *v.* Laflin, 5 Dillon's Circuit Court Reports 65, Fed. Cas. No. 7393, affirmed 103 U. S. 800, 26 L. Ed. 532, has been already cited in this brief

as authority for the position that the purchaser's liability for the stock assessment did not depend on the registration of the stock in his own name. Another point of the opinion, evidently deemed fundamental, was that the liability of the purchaser continues until he transfers to some person capable of taking and holding the shares "who is in law capable of assuming the liabilities of the transferrer."

Shares of bank stock were bought from Laflin through a broker at the instance of James H. Britton, President of the bank. The transfer was entered on the official stock register, in the name of James H. Britton, trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Laflin had no actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had thus been used to pay for it, nor of the entries in respect thereto in the books of the bank. The stock was assigned in blank, with the power of attorney in blank duly endorsed thereon to transfer the shares on the books of the bank. After discussion of English cases holding that the transferrer of shares is liable to be treated as a stockholder, until he transfers to one who is in law capable of assuming the liability attaching to the shares, the opinion, by Circuit Judge John F. Dillon, contains the following well considered observations:

> "And if the seller of shares remains liable under the national banking act until there is a registered valid transfer—that is, until some

person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as 'trustee' without Laflin's knowledge. * * * Britton is responsible personally, inasmuch as he had no authority to act for the bank. * * * **If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any** *cestui que trust* **capable of taking and holding the shares.** If the sale of this stock had been registered to Britton individually, it is clear that Laflin would not have been liable to the bank or its creditors; and, as the matter now stands, **the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of him as trustee.**"

The opinion further declared:

"While we maintain the right of a shareholder to dispose of his shares absolutely, by an out-and-out sale and registered transfer, and thus escape liability provided the sale is made bona fide, **and the purchaser is in law capable of assuming the liabilities of the transferrer,** yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank."

In sustaining the judgment of the Court below, in an opinion by Justice Fields, 103 U. S. 800, 803, 26 L. Ed. 532, it is stated:

> "The sale was consummated, so far as Laflin was concerned, when he delivered the certificate, with the power to transfer it to the broker. The latter did not mention the name of the principal for whom he was acting. * * * Laflin had a right, therefore, to treat him as a principal, and, **if he was competent to make the purchase**, the sale was valid."

ENGLISH CASES.

The English rule permits actual, although not colorable, transfers of stock to irresponsible persons, even where the intent of the transfer is to avoid impending liability. This is pointed out in McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, where it is said: "The law is quite different in this country." Yet, the English decisions, notwithstanding this liberality of viewpoint towards transfers of stock, have unequivocally declared and firmly adhered to the rule that the transfer or purchase of shares in the name of an infant will be deemed "utterly fruitless" to relieve the person making the transfer or purchase from liability.

In re Cobre Mining Company (Weston's Case), L. R. 5 Ch. App. 614, Edward Weston purchased, in 1865, 50 shares of stock. Subsequently, to wit, August, 1866, he gave the scrip certificates of his shares to his son Ernest Mortimer Weston, then 17 years old, a clerk in a stock broker's office. On the 15th of October, 1866, Edward Weston instructed his brokers to buy 25

additional certificates in the company for his son. These shares were accordingly purchased in the name of E. M. Weston. On the 8th and 9th of November, E. M. Weston left at the company's office in his own name the certificates for the 75 shares and a receipt was given him. The shares were thereupon registered in the name of Ernest Mortimer Weston in the share registry book. In December, 1868, a resolution was adopted for the voluntary liquidation of the company. Edward Weston was held as a shareholder of the company in respect to the 75 shares.

Lord Hatherly, deciding Weston's appeal against him, said:

> "There is no doubt that the shares were handed over to the son, and that if he had been of full age, he would be and remain upon the register; but he was a boy of 17 years of age, which, of course, was perfectly well known to his father. If this had been a case of simple transfer, the authorities show that the transfer would have been invalid; * * * **because it could not possibly be assumed, after the winding up, that the infant would ever adopt for his benefit the shares which were so handed over to him.** The authorities have completely and clearly decided that it must be taken that, at the time of the winding up, the transaction was utterly fruitless, and that the person who was the original shareholder remains the shareholder, even in cases where he was entirely innocent of the transaction, and not aware that the shares were being transferred to an infant. * * * In other words, in looking at the substance of the case, I must regard Mr. Weston, at

> this moment, as being the holder of the certificates in the name of a person, himself incompetent to be dealt with as in any way the registered proprietor of the shares; and that having so done, he must take the liabilities which attach not only on the shares he originally held, **but on those which he procured in the market.** * * * It appears to me therefore that he must now be liable in respect to the whole number of shares."

See, also, Richardson's case, L. R. 19, Eq. 588, 32 L. T. (N. S.) 18.

Conclusion.

A sound reason exists for the statutory liability which attaches to the ownership of bank stock; and the Federal courts, in passing upon the different phases of national banking laws, have particularly stressed the intent of the banking act to give real, rather than nominal, protection, in the interest of creditors, and also "to give confidence to all dealing with national banks in respect of their contracts, debts and engagements". Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822; Christopher *v.* Norvell, 201 U. S. 216, 50 L. Ed. 732. Neither the acts of the officers of the bank inducing the purchase of bank stock, nor even the contract of the bank itself, can relieve the stockholder from the statutory liability created in favor of creditors. Wehby *v.* Spurway (Ariz.), 246 P. 759, certiorari denied 273 U. S. 722, 71 L. Ed. 858; Lantry *v.* Wallace, 182 U. S. 536, 45 L. Ed. 1218.

The statutory liability of a shareholder in a bank attaches to him from the time he acquires the stock until, without fraud against the creditors of the bank, he relieves himself from it by a *bona fide* transfer. Adams *v.* Johnson (Bowden *v.* Johnson), 107 U. S. 251, 27 L. Ed. 386.

The acceptance of the transfer of bank stock necessarily implies the assent to be bound for the statutory liability on the stock, for, as the ownership of the stock arises from the voluntary act of the stockholder, he must be regarded as having contracted to be subject to such liability. First National Bank *v.* Hawkins, 174 U. S. 364, 43 L. Ed. 1007. The contract to be subject to this liability is not enforcible, however, against the infant because of his legal incapacity to enter into such a contract; and the ownership of the stock, to which the liability is attached by law, thus reverts, of necessity, to the person from whom the infant received the shares assessed. Johnston *v.* Laflin, 5 Dill 65, Fed. Cas. No. 7393; Aldrich *v.* Bingham, 131 Fed. 363.

In the face of the general banking situation as it existed in many sections of the country, and particularly in South Carolina, for several years preceding January, 1926, it may also be reasonably assumed that the defendant, while he may not have supposed the bank was actually insolvent, was undertaking to avoid the liability of a shareholder, and thus to relieve the stock that he had purchased from the ever-present danger of the statutory assessment to which every other shareholder was liable. The situation of the defendant in placing the stock in the names of his infant children,

may, therefore, be aptly characterized by the same comment appearing in Foster *v.* Lincoln's Ex'r (C. C. A., 2d Circuit), 79 Fed. Rep. 170, 172, where it was said:

> **"We have little doubt * * * that the transfer was made to his irresponsible children with intent that, if all come out well, they might have it, while if the bank should meet with disaster, he would not have thrown good money after bad."**

Respectfully submitted,

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APPENDIX.

The Appellee's Positions on Argument Before the Circuit Court of Appeals.

I.

The authority of the cases that we have cited appears to be recognized in appellee's brief for the Circuit Court of Appeals. Foster *v.* Chase and Aldrich *v.* Bingham being referred to, but not critieized. The other cases were not even referred to.

II

The substance of appellee's contention seems to be that he did not assent to become a stockholder, as he did not buy the stock for himself but bought it for his children; the theory being that his assent and assumption of liability were necessary to incur the statutory liability attaching to ownership of the stock.

The lack of merit in this position is clearly apparent by reference to Johnston *v.* Laflin, 103 U. S. 803, where, under very similar circumstances, it was said:

> "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank. * * * But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price paid."

Also, in Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, it was pointed out that the contract between the parties be-

came complete when the certificates of bank stock were assigned and delivered, even though they were not entered on the corporation books. The purchaser of the bank stock, in accepting delivery of the certificates, impliedly agrees to assume the liability which is inseparable from its ownership. As sustaining this principle, the opinion quotes Lord *v.* Hutzler (Md.), 3 Alt. 891, 892, as follows:

> "The object of sale of the stock must have been to denude himself (the transferrer) of all interest in it, and to transfer it to the purchaser. Henceforth all of the advantages arising from the ownership were to accrue to the purchaser. **and all burdens arising therefrom were to be born by him.**"

III.

The appellee takes the position, however, that, having bought the shares for his children, he was acting as trustee for them, citing Fowler *v.* Gowing, 152 Fed. 801.

The difference of facts between the two cases is obvious. The circumstances which were deemed sufficient to establish a trust are discussed at length in the Gowing opinion, where it was said:

> "In the case now before this court, there was the original investment by the father in the name of the children; the taking of the checks payable to 'D. H. Gowing, Trustee, Helen L. Gowing', etc., the investment of the identical money or checks in the bank stock; the declaration to the officers of the bank at the time that he desired to invest the same for the benefit of his children; the issuance to him of the stock as trustee; the opening of the account in the bank

and in its books in relation to same, with Gowing as trustee; the opening by Gowing at the same time of the account in his own books of account. * * * between himself as trustee for these children, naming them, and himself individually, in which he declares the trust and charges himself as trustee with the stock and its dividends; the subsequent purchase of other stock, etc.—all acts and statements declaring the existence in presenti of a trust and showing an intent and purpose to create an irrevocable trust. It seems to me very clear that on the admitted facts it appears satisfactorily and conclusively that **the defendant not only intended to create, but did create and declare orally and in writing, an irrevocable trust for the children.** The title to the stock was in D. H. Gowig, trustee for these children, and not in his individually."

The opinion continued:

> "There is no question in this case that the trust estate represented by D. Henry Gowing, as trustee, is liable for any assessment made against it on account of this stock held for it, but the defendant, D. Henry Gowing, personally, is not, and any assessment made thereon or on account thereof against D. Henry Gowing, personally, is not enforceable against him or collectable of him from his individual estate."

Nor do we think that the purchaser of bank stock can, by the mere declaration of a trust, evade the application of the statutory provision governing stockholders liability. The benefit and burden of the stock go together. If the holder of bank stock still remains liable, although he transfers the stock in good faith to his infant child, it is inconceiable that he should be

permitted to rid himself of the liability by simply declaring an intention to hold the stock as trustee.

In the case of an existing trust, where the trustee purchases bank stock with the trust money belonging to the trust estate, having authority to make such investment, a different principle governs. See Williams *v.* Cobb, 219 Fed. 663; 242 U. S. 307. This also clearly appears from the holding of the Gowing case. The trust estate does not have the benefits of the stock without taking its burdens; and therefore, **"the trust estate * * * is liable for any assessment made against it on account of this stock held for it."** The sequence of this consideration is that there must first be a trust estate and a trustee before the trustee can make a contract that subjects the trust estate to liability.

IV.

The appellee's next point is that a trust may be created and proved by parol, and that "a voluntary trust in South Carolina is as valid as any other kind"; citing Strong *v.* Weir, 47 S. C. 322, and Stone *v.* Hackett, 12 Gray (Mass.) 227.

The correctness of statement of these general principles is unquestioned, but the very cases cited show the lack of application in the present instance.

In Strong *v.* Weir, the Court said:

> "It is also possible for the donor to constitute himself a trustee for the donee. In order to do this, it is only necessary for the owner, in clear and unequivocal language, or by acts amounting to the same thing, to declare that he henceforth holds the choses in action, or property, as trustee for the donee. * * * So, in case of a valid declaration of trust, like other gifts, **when completely executed,** it is irrevocable."

In Strong *v.* Hackett, it was pointed out that—

> "There was a legal transfer of the property, fully executed to the plaintiff. **There was also a full and explicit declaration of trust,** executed by her and delivered to the grantor, by which she accepted the gift and took on herself the execution of the trust which he intended to establish. Nothing therefore was left *in fieri.* The transaction was a completely executed transfer of property, and fully created a trust."

V.

The appelle further contends that since he has purchased the shares for his children, the Court, rather than impose upon him a burden he did not intend to assume, will hold that the facts constitute him a trustee for his children and thus relieve him from personal liability.

Even equitable considerations and principles have well defined limitations. Intentions often stop short of performance; and hence the rule declared in Pomeroy's Equity Jurisprudence (4th Ed.) Sec. 997, that "a voluntary trust which is still executory, incomplete, imperfect, or promissory will neither be enforced nor aided." A like statement of the same principle is found in Eschen *v.* Steers, 10 F. (2d) 739 (C. C. A., 8th Circuit), where Circuit Judge Kenyon said:

> "Intent to create such trust is not sufficient. * * * Donee must have an enforcible, equitable title to create the relationship of *cestui que trust,* and there must be a complete establishment of the fiduciary relationship. * * * Equity will not interfere to perfect an imperfect or defective gift by declaring a trust. * * *

Nor will equity complete and enforce a mere intention or promise to create a trust."

In Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 997, it was also said:

"A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: 1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust; 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee; 3. He may retain the title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into effect. * * * Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the act of donation is simply an assignment of any form, **but is imperfect** so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; **an imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust.** If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust,

but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself.''

No suggestion of intent to create a trust appears in the certified question or in the statement of fact which precedes it. A gift was intended and the act of donation was the delivery of the stock certificates to the bank for the purpose of having the shares transferred directly to the children. The transaction stands on this basis, and, therefore, is governed by the unbroken current of authorities which hold that the stock liability is inseparable from the ownership of the stock, attaching to the shareholder from the time he acquires the stock until he relieves himself from it by a valid transfer to some other person who is in law capable of assuming the liability.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929

No. 133

THOS. A. EARLY, AS RECEIVER OF THE FARMERS AND MERCHANTS NATIONAL BANK OF LAKE CITY, S. C.,

vs.

J. L. RICHARDSON.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR J. L. RICHARDSON.

H. E. DAVIS,
Florence, S. C.;
A. C. HINDS,
Kingstree, S. C.,
Attorneys for J. L. Richardson.

(34,264)

INDEX.

Subject Index.

	Page
Statement	1
Argument	2
1. Congress has specifically and expressly recognized the right of minors to own stock in national banks	2
2. Since Congress has neither expressly nor impliedly precluded minors from becoming stockholders of national banks, then the general law on the subject applies, and under the general law an infant may own stock in a corporation	7
3. The bank accepted the minors as stockholders and all persons connected with the bank are bound by that acceptance	15
4. Appellee at no time assented to become a stockholder of the Farmers & Merchants National Bank	16
5. Appellee was never the owner of the shares of stock purchased by him for his children	17
6. In purchasing the shares of stock for his children appellee was acting within his right in the utmost good faith and rather than pervert his intention and impose upon him a burden which he did not intend to assume, the court will hold that the facts in this case constitute the appellee a trustee for his children and under the Federal statute he will not be held personally liable	23
Summary	25

Table of Cases Cited.

Ardmore State Bank v. Mason, 30 Okla., 568; 39 L. R. A. (N. S.), 292	13
Aldrich v. Bingham, 131 Fed., 363	16
Bank v. Bank, 156 N. Y., 459; 42 L. R. A., 139	18
Bank v. Dearing, 91 U. S., 29; 23 L. Ed., 196	3
Boards of Commissioners of Tippecanoe County v. Reynolds, 15 Am. Rep., 245	8

	Page
Blunt v. Walker, 31 S. C., 13	24
Chapman v. Brewer, 47 Am. S. R., 779	4
Cross v. Trust Co., 131 N. Y., 330; 27 Am. St. Rep., 497; 15 L. R. A., 606	18
Ford v. Dangerfield, 4 Rich. Eq., 95	24
Foster v. Chase, 75 Fed., 797	16
Fowler v. Gowing, 152 Fed., 801	18
Frances v. Lehre, 1 Rich. Eq., 271 (1844)	19
Gadsen v. Whaley, 14 S. C., 210	19
Harris v. Bracton, 34 S. C., 259; 13 S. E., 447	19
Indemnity Ass'n v. Hunt, 2 L. R. A., 549	7
Keyser v. Hitz, 33 L. Ed., 531	17
McElveen v. Adams, 100 S. C., 437; 94 S. E., 733	19
McNulta v. Cornbelt Bank, 164 Ill., 427; 56 Am. St. Rep., 243	14
Mercer v. Buchanan, 132 Fed., 501	18
Miller v. Ellerbe & Co., 126 Am. St. Rep., 606	10
Morgan v. Struthers, 33 L. Ed., 132	12
New England Trust Co. v. Abbott, 162 Mass., 148; 27 L. R. A., 271	14
Orr Co. v. Cushman, 104 N. Y. S., 510	4
Orth v. Orth, 57 Am. St. Rep., 185	24
Pauly v. Trust Co., 31 L. Ed., 844	18
Proctor v. Clark, 154 Mass., 45; 12 L. R. A., 721	18
Pearlstine v. Insurance Co., 74 S. C., 246; 54 S. E., 372	19
Reilly v. Whipple, 2 S. C., 277 (1868)	19
Sargent v. Insurance Co., 19 Am. Dec., 305	9
Stephens v. Follett, 43 Fed., 842	13
Stone v. Hackett, 12 Gray, 227	21
Strong v. Weir, 47 S. C., 307, 322	19
Trisconi v. Winship, 26 Am. St. Rep., 175	9
Trust Company v. Railway Co., 163 U. S., 31; 41 L. Ed., 60	8
Tutwiler v. Munford, 33 Ala., 308	24
Van Allen v. Assessors, 3 Wall., 573; 18 L. Ed., 229	8
Williams v. Vreeland, 63 L. Ed., 989	17

STATUTES CITED.

Revised Statutes, Sec.	5139	4, 14
	5152	6
	5183	3

TEXTBOOKS CITED.

	Page
7 C. J., 445	13
14 C. J., 103	7
14 C. J., 663	8
45 C. J., 394	4
36 Cyc., 1145	26
39 Cyc., 194	18
Abbott, L. D	4
Perry on Trusts, 2d Ed., Sec. 240	24
242	23
Pomeroy, Equity Jurisprudence, Sec. 1044	24

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BRIEF FOR J. L. RICHARDSON.

Statement.

The Circuit Court of Appeals for the Fourth Circuit has certified to this Court the following question:

> "Is one, who purchases shares of stock of a national bank, liable for an assessment subsequently imposed by the Comptroller of the Cur-

rency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with the intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?''

A statement of the facts pertinent to the consideration of this question accompanies the certificate. Paragraphs III and IV of appellant's statement of case are irrelevant and to some extent at variance with the statement of facts by the Circuit Court of Appeals.

We submit that the foregoing question should be answered in the negative for the following reasons:

1. Congress has specifically and expressly recognized the right of minors to own stock in national banks.

National banks are corporations the powers of which are defined and limited by the Acts of Congress authorizing the creation of such institutions. They are private institutions and do not constitute a part of any branch of the national government (Bank *vs.*

Dearing, 91 U. S. 29, 23 L. Ed. 196). The realm of their activities are prescribed by the legislative department. To determine whether or not any given act on the part of such bank is permitted or prohibited, recourse must be had to the congressional enactments on the subject. Whatever Congress, within its constitutional domain, admits courts cannot deny. Therefore, the federal statutes should first be examined to ascertain what bearing they may have on the solution of the question certified. The only Acts which are pertinent to the consideration of the question are:

(*a*) Section 5183, Revised Statutes:

> "Associations for carrying on the business of banking under this Title may be formed by any number of *natural persons,* not less in any case than five. They shall enter into articles of association, which shall specify, in general terms, the object for which the association is formed, and may contain any other provisions, *not inconsistent with law,* which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

The words, "natural persons", are defined to mean: "A man, woman or child, as opposed to a corporation,

which has a certain personality impressed upon it by law and is called an artificial person."

45 *C. J.* 394.
Abbott L. D.
Chapman *vs.* Brewer, 47 Am. S. R. 779.
Orr Co. *vs.* Cushman, 104 N. Y. S. 510.

We shall hereinafter show that under the general law minors have a right to own shares of the capital stock of corporations. If that be shown to be true, then a national banking association, by the articles of its association, could not prevent minors from owning its stock because to do so would be "inconsistent with law."

(*b*) Section 5139, Revised Statutes:

> "The capital stock of each association shall be divided into shares of one hundred dollars each, and be *deemed personal property,* and *transferable on the books* of the association in such manner as may be prescribed in the by-laws or articles of association. *Every person* becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

The declaration by Congress that the shares of capital stock are personal property is equivalent to declaring that they can be sold and transferred without any restrictions or limitations whatsoever, such being

one of the essential attributes of personal property. The transferability of the shares is left for determination by each association. Nothing to the contrary appearing, it is necessary to act in this case upon the hypothesis that the transfer to the children of Richardson was authorized by the by-laws and articles of association of the Farmers & Merchants National Bank of Lake City. Then by reason of the inherent rights in the property itself, as well as by the unrestricted provisions of the statute, the shares may be transferred to and owned by minors in like manner and to the same extent as they might take and own any article of personal property.

Upon a cursory reading of the last clause of the above section one is inclined to the view that since the transferee must succeed to the liabilities of the prior holder, a minor may not become the transferee of such stock. However, a careful study of the entire sentence reveals the intent of Congress to be the imposition of the liability upon *all* transferees, including such as may be under the disability of infancy. This intent is evidenced by the use of the words "every person", the broadest and most comprehensive term, inclusive of the entire human race—men, women and children—those *sui juris* and the incompetent. The court will not act upon the supposition that Congress intended a vain and useless thing. If the sentence was intended to apply only to persons *sui juris*, it was wholly unnecessary, because the transfer to a person capable of contracting would carry the liability as incidental to and a part of the transaction without any

enabling statutory declaration, especially if the capacity to contract is the controlling element in the assumption of liability on the part of the transferee, as is contended by appellant. It is, therefore, clear that it was not the sole purpose of Congress simply to declare that the acquisition of the rights and the assumption of the liabilities are ingredients of the contract between the seller and buyer of national-bank stock. Considering this clause in conjunction with the other clauses in the section and in connection with the other relevant sections, the only reasonable conclusion to be reached is that it was the intention of Congress to impose the liability upon the real, beneficial owner of the stock irrespective of the ability or disability to contract; to make the liability attachable to the actual ownership of the shares without regard to the manner in which they are acquired—whether by purchase, inheritance, bequest, gift or otherwise.

(*c*) Section 5152, Revised Statutes:

> "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-fund would be, if living and competent to act and hold the stock in his own name."

By this Act Congress unquestionably recognizes the right of a father to bequeath national-bank stock to

his minor child, and of a minor to inherit such shares, and of a guardian to purchase stock for his infant ward, and of trustees to hold the same for infant *cestui que trustent*. What a father can bequeath by his will, he can give in his lifetime. What an infant can inherit from his father he may receive while his parent is living. If Richardson had placed the stock in his name as guardian or trustee for his children, he could not be held personally liable.

2. Since Congress has neither expressly nor impliedly precluded minors from becoming stockholders of national banks, then the general law on the subject applies, and under the general law an infant may own stock in a corporation.

> "Infants are not necessarily precluded from becoming stockholders or members of a corporation, but, on the contrary, unless expressly or impliedly excluded they may become so." 14 *C. J.* 103.
>
> Indemnity Association *vs.* Hunt, 2 L. R. A. 549.

> "Shares of corporate stock being regarded as property, the owner of such shares may, as a general rule, dispose of them as he sees fit, unless the corporation has been dissolved, or unless the right to do so is properly restricted, or the owner's privilege of disposing of his shares has been hampered by his own action. In some jurisdictions this right is expressly provided for by statute. Although there are cases which

> appear to recognize the principle that the right to alienate stock is derived from statute or the corporate charter, as a general rule it is assumed that this right is incidental to the ownership of the shares and is based upon the broad ground that such shares are characterized by the same features as other forms of property." 14 *C. J.* 663.

In the case of Trust Company *vs.* Railway Company, 163 U. S. 31, 41 L. Ed. 60, the Supreme Court of the United States recognizes the unrestricted right of a stockholder to sell and transfer his stock in a corporation.

In the case of Boards of Commissioners of Tippecanoe County *vs.* Reynolds, 15 Am. Rep. 245, the Supreme Court of Indiana, discussing this subject, said:

> "But stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in market like any other marketable commodity. The directors have no control or dominion over it whatever, or duty to discharge in reference to its sale and transfer, unless it be to see that proper books and facilities are furnished for that purpose. As the property of the individual holder, he holds it as free from the dominion and control of the directors as he does his lands or other property."

In the case of Van Allen *vs.* Assessors, 3 Wall. 573, 18 L. Ed. 229, Mr. Justice Nelson, in delivering the

opinion of the Supreme Court concerning the character of national-bank stock, said:

> "This is a distinct, independent interest or property held by the shareholder like any other property that may belong to him."

In the case of Trisconi *vs.* Winship, 26 Am. St. Rep. 175, the Supreme Court of Louisiana held that stockholders in a corporation, including its directors who own stock, have the indisputable right to dispose of their stock at their pleasure.

In the case of Sargent *vs.* Insurance Company, 19 Am. Dec. 306, the Supreme Court of Massachusetts, in discussing the subject, said:

> "We think it can not be maintained that the right to the shares in the capital stock of this corporation can not be transferred without a literal compliance with the by-laws. It is personal property: 3 Dane's Abr. 108; 5 *Id.* 157. It might be conveyed by will; it might descend from an intestate to his heir. It may be assigned without deed, by a delivery of the certificate with an indorsement upon it for a valuable consideration: Quiner *vs.* Marblehead Ins. Co., 10 Mass. 476. And in such cases the legatee, heir, or assignee would be entitled to have the transfer made in the books, and to a certificate of his property. A by-law which limits the transfer of the stock to be made only at the office personally or by attorney, and with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways."

In the case of Miller *vs.* Ellerbe & Company, 126 Am. St. Rep. 606, the Supreme Court of Nebraska discusses this subject fully, and we quote therefrom at length:

> "The question presented by the appeal is whether a corporation organized under the laws of this state can, by its by-laws, limit the number of shares of stock a person may hold at one time, and prevent a transfer of stock by a stockholder to a non-stockholder without the consent of the directors of the corporation. If it can, the decree of the District Court is wrong and should be reversed; otherwise it should be affirmed. The power to make by-laws not inconsistent with the law of the land is one of the common-law incidents to a corporate existence (Angell and Ames on Corporations, 11th Ed. Sec. 325), and is expressly conferred by statute: Comp. Stats. 1905, c. 16, Sec. 124. The transfer of stock has been uniformly regarded as a legitimate subject of corporate legislation, to enable the company to know who are stockholders, to whom dividends are to be paid, who are entitled to vote, and where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights. But such legislation will not be enforced beyond what is necessary to serve those purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the disposition of property in the stock of the corporation: Farmers' & Merchants' Bank *vs.* Wasson, 48 Iowa 336, 30 Am. Rep. 398. As is said in Boone on

Corporations, Section 122: 'The right of transfer is incidental to the ownership of shares in the stock of joint-stock companies and corporations formed in pursuance of legislative authority; and a by-law which unreasonably interferes with the free exercise of this right is void, as being in restraint of trade.' See, also, 2 Thompson's Commentaries on the Law of Corporations, Sec. 2300; Angell and Ames on Corporations, 11th Ed., Secs. 353, 354; 1 Cook on Stock and Stockholders, Secs. 331, 332; 2 Cook on Corporations, Sec. 621*a*. The correlative right to purchase rests on similar grounds: 2 Thompson's Commentaries on the Law of Corporations, Sec. 2300.

"*In re* Klaus, 67 Wis. 401, 29 N. W. 582, the court said: 'A by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all the stockholders is against public policy and void. No exception can be made in the application of this rule on the ground that the stockholders of a corporation are few, and were originally copartners, and the one against whom the by-law is invoked consented to and voted for it.' In Herring *vs.* Ruskin C. Assn. (Tenn. Ch.), 52 S. W. 327, the court held that a by-law prohibiting the transfer of stock except to the corporation, though indorsed on the certificate of stock, was void. In Chouteau Spring Co. *vs.* Harris, 20 Mo. 382, the court held that the power to regulate the transfer of stock did not include the power to restrain transfers or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them, and that the company could not prevent a party

from selling his stock, even to an insolvent person. In Bloede Co. *vs.* Bloede, 84 Md. 129, 57 Am. St. Rep. 373, 34 Atl. 1127, 33 L. R. A. 107, the court held that a by-law, requiring a stockholder to give notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, was an invalid restraint of alienation. In Ireland *vs.* Globe Milling Co., 21 R. I. 9, 41 Atl. 258, the court held that a statute authorizing corporations to make by-laws consistent with the laws of the state did not authorize a by-law requiring stockholders, before selling their stock, to first offer it to the corporation, and that the assignee of shares was not bound by a corporate by-law passed without authority of statute, even though his assignor had assented thereto. See, also, Morgan *vs.* Struthers, 131 U. S. 246, 9 Sup. Ct. Rep. 726, 33 L. Ed. 132; McNulta *vs.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; Moore *vs.* Bank of Commerce, 52 Mo. 377. The bylaws under consideration, tested by the authorities cited, operate as an unreasonable restriction upon the transfer of stock, and are void as an unlawful restraint upon the transfer of property."

In the case of J. Pierpont Morgan *vs.* Thomas Struthers (33 L. Ed., 132), the Supreme Court of the United States, through Mr. Justice Lamar, who delivered the opinion of the court, among other things, said:

"One essential feature of an incorporated, joint stock company is the right of each stock-

> holder, without restraint, to sell or transfer his shares at pleasure. Thompson, Liability of Stockholders, Sec. 210, and cases there cited. So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraint of trade. Moore *vs.* Bank of Commerce, 52 Mo. 377. Even where the charter gives the corporation the power to regulate transfer of stocks it has been held that this power does not include the authority to restrain transfers. Choutteau Spring Company *vs.* Harris, 20 Mo. 382, citing 10 Mass. 476, and numerous other authorities."

It may be argued that the numerous authorities above cited apply to business corporations generally and not to banks where a statutory liability is provided, but the general principle of law in this respect is expressed in 7 *Corpus Juris*, 445, in the following language:

> "Stock in a bank is generally transferable the same as stock in any other corporation, and a bank ordinarily cannot prevent the transfer by refusing to recognize the purchaser as a stockholder."

In Stephens *vs.* Follett, 43 Fed. 842, it is held that "the sale or transfer of national-bank stock is governed by the same rules that apply to other incorporated companies."

In Ardmore State Bank *vs.* Mason, 30 Okla. 568, 39 L. R. A. N. S. 292, the Supreme Court of Oklahoma

declares that "A stockholder who is not indebted to the bank may sell, assign or pledge his stock free from any statutory lien of the bank."

In McNulta *vs.* Cornbelt Bank, 164 Ill. 427, 56 Am. St. Rep. 243, the Supreme Court of Illinois held that shares of bank stock are as transferable as any kind of personal property, and all unreasonable attempts to restrain the right to transfer such shares are void as against public policy.

To the same effect is the case of New England Trust Company *vs.* Abbott, 162 Mass. 148, 27 L. R. A. 271:

> "Even state legislation cannot limit or interfere with the transferable quality of national bank stock as that exists under statutes of the United States. Doty *vs.* First Nat. Bank of Larimore (1892), 17 L. R. A. 259, 3 N. Dak. 9.
>
> "A by-law of a national bank prohibiting the transfer of its stock without assent of the directors is in contravention of the act of Congress, and void. Feckheimer *vs.* National Exch. Bank of Norfolk (1884), 79 V. 80; Bank of Attica *vs.* Manufacturers & Traders Bank (1859), 20 N. Y. 501.
>
> "To the same effect it is said in Johnson *vs.* Lafflin (1878), 5 Dill. 65, affirmed (1880) 103 U. S. 800, 26 L. Ed. 532, that a national-bank association cannot take away or defeat the right of a stockholder to make a *bona fide* transfer of his stock, which right is given him by U. S. Rev. Stat., Section 5139."

Section 5139 of the Revised Statutes provides that:

> "The capital stock of each association shall be divided into shares of $100.00 each and be

> deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of an association."

It has not been shown that there is anything in the by-laws or articles of association of The Farmers & Merchants National Bank of Lake City prohibiting minors from owning stock in said bank.

3. The bank accepted the minors as stockholders and all persons connected with the bank are bound by that acceptance.

The only requirement of Section 5139, Revised Statutes, concerning the transfer of stock is that it shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." Nothing to the contrary appearing, it will not be presumed that the officers of the bank violated any of the by-laws or articles of association. On the other hand, it will be presumed that the officers properly discharged their duty and that the transfers were properly made to the minors. The depositors and creditors of a national-banking association have no right to choose the stockholders of the assocation or to determine who they shall be. That is governed solely by the "by-laws or articles of association," and when those are complied with in transferring stock all persons dealing with the association are bound. The relations of the depositors and creditors to The Farmers & Merchants National Bank of Lake

City, S. C., were voluntarily assumed with imputed knowledge of the laws and regulations concerning the transfer of stock, and since those laws and regulations have been complied with in connection with the transfer of the stock in question they are bound and have no ground to complain.

4. Appellee at no time assented to become a stockholder of the Farmers & Merchants National Bank.

The cases of Foster *vs.* Chase, 75 Fed. 797, and Aldrich *vs.* Bingham, 131 Fed. 363, upon which appellent mainly relies, hold that assent is necessary to becoming a shareholder subject to the statutory liability in national banks, and that the liability must be lawfully assumed. The conclusion of the courts in those cases that minors cannot become stockholders in national banks is based solely upon the theory that minors are incapable of assenting to and assuming the liability. Therefore, appellant's case is based solely upon the necessity of assent and assumption of liability. If appellee did not assent to become a stockholder and did not assume liability, then by appellant's own argument he cannot be held liable.

Assent is a state of mind. Assumption of liability is a matter of intention. Such state of mind and intention can only be determined from what is said and done. Both the declarations and conduct of Richardson plainly manifest a dissent on his part to become a stockholder and indisputably show his intention not to assume the liability.

Attention is called to the following portion of the question certified by the Circuit Court of Appeals:

> "It appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with intent at the time of such purchase and delivery of giving the stock to his minor child."

In the cases of Williams *vs.* Vreeland, 63 L. Ed. 989, and Keyser *vs.* Hitz, 33 L. Ed. 531, the United States Supreme Court also held that such assent and assumption of liability were necessary in order to incur statutory liability in national banks.

The placing of the stock in one's name on the books of the bank without his consent or knowledge and in violation of his instructions and contrary to his wishes cannot constitute him a stockholder of the bank and could not subject him to statutory liability. Williams *vs.* Vreeland and Keyser *vs.* Hitz, *supra.*

5. Appellee was never the owner of the shares of stock purchased by him for his children.

Although his money paid for the stock, he took the certificates from the vendors in trust for his children. He did not buy the stock for himself. He bought the shares for his children and in taking the physical possession of the certificates for the purpose of carrying them to the bank and having them placed in the names of his children he was merely acting as trustee for them.

In the case of Fowler *vs.* Gowing, 152 Fed. 801, it was held that where a father voluntarily declared a trust of certain shares in a national bank for the benefit of his children in good faith and not for the purpose of evading liability and did not hold himself out as owner of the stock, individually, he was not liable personally as a stockholder on the failure of the bank. The fact that the trust estate was wiped out by the failure of the bank did not change the trustee to a stockholder individually. The main question discussed in that case was whether or not a trust was created. This was answered in the affirmative and the court held that a parent has a perfect right in his lifetime to create a trust for his children. No notice was given to his children. Nothing was said to them. They had no knowledge of the transaction. The entire transaction was in good faith. There was no concealment. In the case of Pauly *vs.* Trust Company, 31 L. Ed. 844, the Supreme Court of the United States held that the statute above referred to governs any kind of trust and not only those created by deed, will or other written instrument.

In determining the creation and validity of a trust, the law of the domicile must control.

39 Cyc. 194;

Cross *vs.* Trust Co., 131 N. Y. 330, 27 Am. St. Rep. 497; 15 L. R. A. 606;

Proctor *vs.* Clark, 154 Mass. 45; 12 L. R. A. 721;

Mercer *vs.* Buchanan, 132 Fed. 501;

Bank *vs.* Bank, 156 N. Y. 459; 42 L. R. A. 139.

In South Carolina a trust in personal property may be created and proved by parol.

McElveen *vs.* Adams, 100 S. C. 437; 94 S. E. 733;

Pearlstine *vs.* Insurance Co., 74 S. C. 246, 54 S. E. 372;

Strong *vs.* Weir, 47 S. C. 307;

Gadsden *vs.* Whaley, 14 S. C. 210;

Harris *vs.* Bracton, 34 S. C. 259, 13 S. E. 447.

A voluntary trust in South Carolina is as valid as any other kind.

Frances *vs.* Lehre, 1 Rich. Eq. 271 (1844);

Reilly *vs.* Whipple, 2 S. C. 277 (1868).

Since the general doctrine was announced in the two cases cited, the courts in this State have recognized and enforced voluntary trusts in cases too numerous to cite. To illustrate how firmly is this principle established in the courts in South Carolina we quote at length from the case of Strong *vs.* Weir, 47 S. C., beginning at page 322:

> "In A. & E. Enc. of Law, Vol. 8, page 1323, the law is thus stated: 'The title to choses in action, as well as that to any other class of property, may be voluntarily transferred in another manner, without even a delivery, and that is by a declaration of trust. The title to a chattel can ordinarily be transferred by way of gift, as we have heretofore seen, by delivery of the article, actually or constructively, to the donee or to some person in trust for him. It

is also possible for the donor to constitute himself a trustee for the donee. In order to do this, it is only necessary for the owner, in clear and unequivocal language, or by acts amounting to the same thing, to declare that he henceforth holds the choses in action, or property, as trustee for the donee. When this is duly executed by the owner, by an act intending to be binding on himself, equity will uphold it, whether the property be legal or equitable, or whether it be capable of transfer or not. 'If the trust is perfectly created, so that the donor or settler has nothing more to do to create it, and the party seeking to enforce it has no need of further conveyance from the settler, and nothing is required of the Court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed.' On page 1340 of the same volume it is said: 'If the property is delivered to a trustee for the benefit of the donee, the trustee, if he accepts the trust, must execute it, and the *cestui que trust* has a good right of action against him if he does not. The donor or settler has no control over it, unless some reservation is lawfully made in the trust. So in case of a valid declaration of trust, like other gifts, when completely executed, it is irrevocable.' See, also, Gadsden *vs.* Whaley, 14 S. C. 210; Caldwell *vs.* Wilson, 2 Sp. 75; Richardson *vs.* Inglesby, 13 Rich. Eq. 59. When a trust is complete in its creation, it is not rendered revocable by reason of the fact that certain things remain to be done to carry its terms into effect.

> The creation must be *in presenti*; the execution of its provision may be, and generally is, *in futuro.*"

When appellee paid for the shares of stock and took them to the bank and instructed the bank's officers to transfer them on the books and issue new certificates in the names of the children he did all he could and all that was required of him.

This position is fully sustained by Mr. Chief Justice Bigelow of the Supreme Court of Massachusetts in the case of Stone *vs.* Hackett, 12 Gray. 227. The settler purchased stocks in several corporations in the name of "H. P. K.," by whom a declaration of trust was made. The transfer on the back of the certificates was signed and the certificates taken to the corporation for the transfer of the same on the books and the issuing of new certificates. The settler died and a question arose as to the title to the stock. Chief Justice Bigelow said:

> "The key to the solution of the question raised in this case is to be found in the equitable principle now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid and its provisions enforced and carried into effect against all persons except creditors and *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it re-

mains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery. The leading case in which the principle is declared and acted upon is Ellison *vs.* Ellison, 6 Ves. 656, in which Lord Eldon decreed the enforcement of a trust which in its creation was wholly voluntary and without consideration. This has been followed by many other cases in which the same principle was recognized. Pulvertorf *vs.* Pulvertoft, 18 Ves. 84; *Ex parte* Pye, *ib.*, 140; Sloan *vs.* Cadogan, Sugd. Ven. & Pur. (11th Ed.) 1119; Fortescue *vs.* Barnett, 3 My. & K. 36; Wheatley *vs.* Purr, 1 Keen 551; Blakely *vs.* Brady, 2 Dru. & Wal. 311; Browne *vs.* Cavendish, 1 Jon. & La. 637; Kekewich *vs.* Manning, 1 De G., M. & G. 176. The last-named case contains a full discussion of all the authorities and a clear and accurate statement of the law upon the subject."

"The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity of trustee was full and complete and vested in her legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. * * *"

6. In purchasing the shares of stock for his children appellee was acting within his right in the utmost good faith, and rather than pervert his intention and impose upon him a burden which he did not intend to assume, the Court will hold that the facts in this case constitute the appellee a trustee for his children, and under the Federal statute he will not be held personally liable.

In the United States it is well established that if a corporation that requires a transfer of its stock to be made by its own officers upon its own books permits a transfer to be made by an executor, trustee or guardian of stock held by such persons in a fiduciary capacity, such corporation, knowing the trust and that the transfer is made for purposes other than such trust, will be held in equity as a constructive trustee of the stock thus wrongfully conveyed and will be liable to make it good to the *cestui que trust*. Perry on Trusts, 2nd Ed., Section 242.

As where a man makes a devise in trust by his will and names no trustee, the land descends to his heir, but in trust for the purposes named in his will, and his heirs will be required to account for the property and to convey the same to such trustees as the court might appoint. Courts of equity have inherent jurisdiction over all matters of trust and trustees and they never allow a trust to fail for want of a trustee. So if a party forbidden by law to convey his property to some person standing in a certain relation to him, as if a husband who cannot convey to his wife should make an absolute conveyance directly to her, the conveyance

would not pass the legal title, but equity would construe it into a declaration of trust and the husband into a trustee for the wife. Perry on Trusts, 2nd Ed., Sec. 240. Tutwiler *vs.* Munford, 33 Ala. 308.

It frequently happens that courts of equity construe a trust to arise from the contracts and dealings of parties although a trust is not within their contemplation and there is no fraud, actual or constructive. Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner where there is no intention of the parties to create such a relation and in most cases contrary to the intention of one holding the legal title and where there is no express or implied, written or verbal, declaration of trust.

Pomeroy, Equity Jurisprudence, Section 1044.
Orth *vs.* Orth, 57 Am. St. Rep. 185.

Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done.

Ford *vs.* Dangerfield, 4 Rich. Eq. 95.

It is held that where the words of a will are not merely those of advice or request, but declare a trust which is void or unlawful, the legatee holds the property for the next of kin, and if there be none, then for the State.

Blunt *vs.* Walker, 31 S. C. 13 (S. C.).

Summary.

The question contained in the certificate of the Circuit Court of Appeals has not heretofore been decided by this Court and none of its previous decisions can be said to be controlling. While the authorities cited may be helpful as forming the foundation for the several views and affording the basis of the respective arguments, they are not binding upon this Court. The only laws by which the Court is actually bound in this case are the provisions of the Federal Constitution and the Acts of Congress. If by a fair and reasonable interpretation and construction of those laws it is found that they do not prohibit a father from purchasing national-bank stock for his minor child, then the question should be answered in favor of appellee, because it is conceded that he was acting in good faith, without any knowledge of the failing condition of the bank and without any intent to evade the statutory liability. Transactions entered into in good faith should be allowed to stand unless they clearly fall within the purview of some legal inhibition.

There is no express prohibition. There are clauses from which it can be reasonably implied that such transactions are sanctioned and recognized. Appellant does not point to any clause or section of any Act of Congress which either expressly or impliedly places the liability upon appellee. But let it be granted that there is some clause from which may be drawn a fair inference to the effect that the father, under such circumstances, is liable; and another clause from which

it may be reasonably implied that he is not. Then the fair inference is neutralized by the reasonable implication and the transaction would be left to stand. It requires a stronger inference or implication to invalidate a transaction entered into in good faith than to permit it to stand.

The section of the statute providing for the individual liability of shareholders was amended in 1913, 28 Stat., 273. At that time it was so well established that minors could own stock in corporations generally, as to require Congress, if it intended for minors not to own stock in national banks, to say so in positive terms. Its not doing so is strong evidence that it had no such intention.

Since under the general law minors may own and hold stock in corporations, "the statutes are not to be understood as effecting any change in the law beyond that which is *expressed or is necessarily implied from the language used.*" 36 Cyc. 1145. There is nothing expressed. There is no language used from which it must be necessarily implied that minors should not own stock in national banks. The language used tends more strongly to admit than to deny such ownership of such stock.

Appellant does not seek reliance upon the language of the statutes, but relies solely upon two decisions of United States District Courts and some English cases which adopt the theory that the father is liable because the minors are incapable of assenting to and assuming the liability. This theory is based entirely upon the absolute necessity for assent to and assumption of lia-

bility; where there is no assent and no assumption, there can be no liability. Richardson purchased the shares with the intent of giving them to his children, and, with like intent, promptly presented the certificates to the bank and caused the shares to be registered and new certificates to be issued in the names of the children. There is a total absence of assent and assumption of liability on his part. Therefore, by appellant's own argument, he is not liable.

The statute does expressly provide for the holding of stock by a trustee for the benefit of infants. One of the primary objects of courts of justice is to protect persons in their honest dealings. Another is to aid in the effectuation of a *bona fide* intent. It is the office of judicial tribunals to encourage and preserve fairness and good faith as well as to discourage and destroy dishonesty and fraud. If the court can find some reasonable ground, not inconsistent with law, to protect an honest transaction entered into in good faith, it is but serving one of the fundamental purposes of its existence to do so. It is reasonable and entirely consistent with law to hold that the facts in this case constitute Richardson a trustee for his children, and, therefore, not himself personally liable.

H. E. DAVIS,
A. C. HINDS,
Attorneys for J. L. Richardson.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 133.—October Term, 1929.

Thos. A. Early, as Receiver of the Farmers and Merchants National Bank of Lake City, S. C. *vs.* J. L. Richardson.	On Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[February 24, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

The court below has certified to this court the following question of law upon which instruction is desired:

"Is one, who purchases shares of stock of a national bank, liable for an assessment subsequently imposed by the Comptroller of the Currency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?"

The suit was brought to recover the amount of an assessment upon nineteen shares of the capital stock of the bank ordered by the Comptroller of the Currency because the assets of the bank were insufficient to pay creditors. Richardson had purchased the stock and received three certificates therefor endorsed in blank by the seller. He delivered these certificates to the bank with verbal instructions to register the stock and issue two new certificates for sixteen shares in the name of his minor son, and another one for three shares in the name of his minor daughter. This was done, the new certificates being retained in the custody of the bank.

When Richardson bought the stock and received the certificates therefor, endorsed by the seller, title passed and the transfer was complete as between the parties. *Johnston* v. *Laflin,* 103 U. S. 800, 804. Thereupon, as between seller and purchaser, the purchaser alone became liable for any assessment thereafter imposed; for, as between them, it would be in disregard of all equitable principles to continue against the seller the burdens of ownership after the purchaser had become entitled to all the benefits including the receipt of dividends. Whether under the facts the liability of the seller continued, as between him and the creditors, is a different matter not necessary to be considered; for, in any event, the purchaser, who alone is sued, is not concerned with that question.

That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled. *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, 168; *Davis* v. *Stevens,* 17 Blatchf. 259, sc. 7 Fed. Cas. 177, 178; *Case* v. *Small,* 10 Fed. 722, 724; *Houghton* v. *Hubbell,* 91 Fed. 453.

The real question is whether the intent of Richardson to buy the stock for his minor children, and the fact that by his direction the transfer was made to them upon the books of the bank and certificates issued in their names, had the effect of relieving Richardson from liability. We think not, since the transferees, being minors, were without legal capacity to assume the obligation. Upon coming of age they would have an election either to affirm or avoid the entire transaction. In the meantime, the transfer of the stock having resulted to their disadvantage, the law will avoid it for them, thus leaving the liability of Richardson for assessments unaffected. See *Aldrich* v. *Bingham,* 131 Fed. 363; *Foster* v. *Chase, Foster* v. *Wilson,* 75 Fed. 797.

In *Foster* v. *Chase, supra,* the father bought stock in the names of his minor children, and suit was brought against him for the amount of an assessment. Disposing of the point here presented the court well said:

"The plaintiff claims that the defendant made himself liable for the assessment because of the incapacity of his children to take the stock and make themselves liable for it. He insists that they only are the shareholders, and liable, if any one is. Assent is necessary to becoming a shareholder, subject to this liability, in a national bank. *Keyser* v. *Hitz,* 133 U. S. 138, 10 Sup. Ct. 290. Minors do not seem to have anywhere the necessary legal capacity for that.

The principles upon which this disability rests are elementary and universal. 1 Bl. Comm. 492; 2 Kent, Comm. 233. In buying and paying for this stock, and having it placed on the books of the bank, the defendant acted for himself; in having it placed there in the names of his children, as with their assent, he assumed to act for them. As they could not themselves so assent as to be bound to the liabilities of a shareholder, they could not so authorize him to assent for them as to bind them. To the extent that they could not be bound he acted without legal authority, and bound only himself. Story, Ag. § 280."

There is no merit in the point, made in argument, that Richardson was a trustee for the minors, even if that would enable him to avoid personal liability, *Johnston* v. *Laflin,* 5 Dillon 65, 82; and there is nothing certified by the court below which furnishes a basis for the suggestion. Richardson, having bought with his own money, became the owner of the stock. And although the purchase was made with the intent of giving the stock to his children, *non constat* that he would not change his mind, as he was perfectly free to do. The new certificates simply were issued and registered in the names of the children, and this, if effective, would have resulted only in consummating an ordinary gift. It no more created a trust than if the donees had been persons *sui juris.* The question must be answered in the affirmative.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 336

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, ET AL., APPELLANTS,

vs.

SPARKILL REALTY CORPORATION AND STANDARD TRAP ROCK CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED AUGUST 21, 1929

(34,467)

(34,467)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the district court of the United States, Southern New York	1	1
Citation and service (omitted in printing)	1	
Order to show cause	6	1
Bill of complaint	9	3
Exhibit "A"—Agreement between Sparkill Realty Corp. and Standard Trap Rock Corp., May 19, 1927	21	11
Exhibit "A"—Description of leased land	32	19
Exhibit "B"—Supplemental agreement, May 19, 1927	36	23
Exhibit "C"—Supplemental agreement, October 19, 1927	40	25
Exhibit "D"—Supplemental agreement, December 1, 1927	44	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1929

	Original	Print
Exhibit "E"—Letter to A. L. Richards, October 14, 1927	47	30
Exhibit "F"—Statement, Standard Trap Rock Corp., October 12, 1928	49	32
Exhibit "G"—Statement of approval by conservation department	50	34
Affidavit of James G. Shaw	51	35
Ellis C. Soper	62	45
Frank T. Gucker	65	47
Arthur S. Lane	68	49
William E. Keine	71	51
Edward W. Christie	73	52
Jackson A. Dykman	76	53
Statement of approval by conservation department.	78	54
Affidavit of J. Du Pratt White	82	56
Exhibit 1—Appropriation papers	94	64
Exhibits 2, 3, and 4—Correspondence	113	75
Affidavit of Frederick C. Sutro	116	77
Supplementary affidavit of J. Du Pratt White	119	78
Motions to dismiss	121	79
Decree of interlocutory injunction	125	81
Opinion, Manton, J	132	86
Petition for appeal and order allowing same	149	97
Assignments of error and prayer for reversal	151	98
Bond on appeal (omitted in printing)	160	
Stipulation re transcript of record	161	105
Clerk's certificate (omitted in printing)	164	
Statement of points to be relied upon and designation of parts of record to be printed	165	106

[fols. 1-4] Citation, in usual form, showing service on John Otto et al., omitted in printing.

[fols. 5 & 6]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

Vol. 48, Page 348

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK Corporation, Plaintiffs,

against

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker, and Frederick H. Osborn, Constituting the Board of Commissioners of the Palisades Interstate Park; Hamilton Ward, as Attorney General of the State of New York, and Alexander Macdonald, as Commissioner of the Conservation Department of the State of New York, Defendants

ORDER TO SHOW CAUSE

Plaintiffs having presented an application for a temporary restraining order and an interlocutory injunction herein and the papers submitted in support of the application having been filed and sufficient cause appearing, it is

Ordered that the application of the plaintiffs for an interlocutory injunction be heard before a court constituted in the manner prescribed by section 266 of the Judicial Code of the United States of America on the 6th day of April, 1929, at 10 o'clock in the forenoon of that day at the room of the Circuit Court of Appeals in the Courthouse in the Post Office Building in the Borough of Manhattan, in the [fol. 7] city and state of New York; and the defendants and each of them at such time and place show cause why an in-

terlocutory injunction should not issue herein enjoining and restraining the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of the provisions of chapter 242 of the Laws of 1928 of the State of New York or any description, certificate or notice purporting to be made thereunder, from continuing in possession of plaintiffs' property described in the bill of complaint or in any way enforcing or attempting to enforce the provisions of said act, description, certificate or notice against plaintiffs or from proceeding by law or in equity, by summons, writ, petition or otherwise for the purpose of compelling compliance with said act, description, certificate or notice and granting plaintiffs such other, further or different relief as may seem meet and the nature of the suit require, and being of opinion from specific facts shown by affidavits and by the verified bill that immediate and irreparable loss or damage will result to the applicants before the matter can be heard on notice unless a temporary restraining order is granted, it is

Further ordered that, pending the return of this order and the hearing and determination of the plaintiffs' application and the entry of a further order herein, the defendants and each of them and their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of the provisions of said act of the Legislature of the state of New York, or any description, certificate or notice purporting to have been made thereunder with reference to property of the plaintiffs described in the bill of complaint and particularly a description, certificate and notice dated October 10, 1928, are restrained from in any way changing the nature of, altering or destroying said property; and it is

[fol. 8] Further ordered that a copy of this order be served at least 10 days before the return day herein upon the Honorable Franklin D. Roosevelt, Governor of the State of New York, the Honorable Hamilton Ward, Attorney General of the State of New York, upon at least one of the other defendants constituting the Board of Commissioners of the Palisades Interstate Park, and upon Alex-

ander Macdonald, Commissioner of the Conservation Department of the State of New York; and it is

Further ordered that any answering affidavits of the defendants be served upon the solicitors for the plaintiffs at least five days before the date hereinbefore specified as the return day of this application and that any affidavit of the plaintiffs in reply thereto be served upon the solicitors for the defendants at least two days before the day of the argument of this application.

Plff. to give bond of $250 conditioned as per statute.

Dated, New York, March 19th, 1929.

Julian W. Mack, United States Circuit Judge.

[fol. 9] In United States District Court

[Title omitted]

Bill of Complaint

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Sparkill Realty Corporation and Standard Trap Rock Corporation, corporations organized under and by virtue of the laws of the State of New York, having their places of business in the Borough of Manhattan, City of New York, bring this bill against J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney [fol. 10] General of the State of New York, and Alexander Macdonald as Commissioner of the Conservation Department of the State of New York, and thereupon plaintiffs allege and complain:

First. Plaintiff, Sparkill Realty Corporation is a corporation organized under and pursuant to the Corporations Law of the State of New York, on the 6th day of February, 1914.

Second. Plaintiff, Standard Trap Rock Corporation, is a corporation organized under and pursuant to the Stock

Corporations Law of the State of New York, on the 17th day of May, 1927.

Third. Defendants, J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constitute and are acting as the Board of Commissioners of the Palisades Interstate Park Commission, having been duly ap-ointed under and pursuant to chapter 242 of the Laws of 1928 which, as amended, prescribes the powers and duties of the Commission.

Fourth. Defendants, Frederick C. Sutro, Franklin W. Hopkins, George T. Smith and William Childs are citizens of and reside in the State of New Jersey, and defendants, J. Du Pratt White, Edward J. Partridge, George W. Perkins, Jr., W. Averell Harriman and Frederick H. Osborn are citizens of and reside in the State of New York, and at least one of these defendants resides within the Southern District of New York.

Fifth. Defendant, Hamilton Ward, is Attorney General and a citizen of the State of New York and resides in the City of Buffalo, New York.

Sixth. Defendant, Alexander Macdonald, is the Commissioner of the Conservation Department and a citizen of the [fol. 11] State of New York and resides in St. Regis Falls, New York.

Seventh. On May 19, 1927, and at all times hereafter, Sparkill Realty Corporation has been the owner in fee simple of the premises described in the schedule attached to Exhibit A, hereto annexed and made a part hereof, situated at Piermont, in the town of Orangetown, County of Rockland, State of New York, within the Southern District of New York, consisting of meadow lands and lands to the top of the cliff containing a deposit of rock known as "trap rock" of great value.

Eighth. On April 13, 1927 Anderson Dana procured an option for a lease of the said property and a copy of the proposed lease as agreed upon was annexed to the option and said option assigned to Standard Trap Rock Corpora-

tion and on or about May 19, 1927, plaintiff, Sparkill Realty Corporation, leased the said property to plaintiff, Standard Trap Rock Corporation, by written agreement of lease, a copy of which is hereto annexed, marked "Exhibit A" and made a part hereof, and supplemental agreements, copies of which are hereto annexed, marked "Exhibit- B," "C" and "D," and made a part hereof.

Ninth. On or about May 7, 1927, defendants, Board of Commissioners of the Palisades Interstate Park, adopted a resolution, of which plaintiffs were notified on June 11, 1927, that all preliminary steps be taken toward the acquisition of the said property for the purpose of a State park, said notice being to the effect that the property to be acquired consisted of the meadow lands and the uplands to the top of the cliff.

Tenth. On October 18, 1927, plaintiffs were notified in writing by Messrs. Hughes, Rounds, Schurman & Dwight, attorneys for defendants, Board of Commissioners of the Palisades Interstate Park, to the effect that certain data, information and valuation filed October 14, 1927, by plaintiffs had been submitted to defendants, Board of Commis-[fol. 12] sioners of the Palisades Interstate Park, and that said defendants had requested said attorneys to notify plaintiffs that at a meeting of the Board held October 18, 1927, it had been decided and resolved by said defendants that their counsel be instructed to take no steps for the condemnation of the said property.

Eleventh. Said communication of October 18, 1927, was acknowledged by the attorneys for plaintiff, Standard Trap Rock Corporation, on October 18, 1927, in a letter stating that plaintiff, Standard Trap Rock Corporation, was accordingly proceeding with the plans which it had made for the development of the property as a quarry and which had been in abeyance since receipt of the aforesaid notice from defendants, Board of Commissioners of Palisades Interstate Park, dated May 7, 1927.

Twelfth. Relying upon the assurance contained in the aforesaid communication of October 18, 1927, from the attorneys for the defendants, Board of Commissioners of Palisades Interstate Park, and in the belief that it was free to develop its property, plaintiff, Standard Trap Rock Cor-

poration, thereafter executed contracts for the erection and equipment of a plant on the said premises and for the manufacture and erection of equipment specially designed and built for use at this particular place and not adaptable for use elsewhere, thereby subjecting itself to liability in excess of one million ($1,000,000) dollars.

Thirteenth. Actual construction of the plant and installation of equipment by plaintiff, Standard Trap Rock Corporation, was commenced in the month of April, 1928, and would have been completed and the plant in operation on or about December 1, 1928, but for the subsequent unlawful conduct of defendants, Board of Commissioners of Palisades Interstate Park, hereinafter described.

Fourteenth. On or about September 29, 1928, the Honorable Alfred E. Smith, Governor of the State of New York, [fol. 13] the Honorable C. J. Hewitt, Chairman of the Finance Committee of the Senate, the Honorable Everly Hutchinson, Chairman of the Committee on the Ways and Means of the Assembly, defendants, Board of Commissioners of the Palisades Interstate Park, and the Conservation Department, Division of Parks, State Council of Parks of the State of New York, purporting to act under the provisions of section 4, chapter 16 of the Laws of 1926, and chapter 75 part 5, of the Laws of 1928 of the State of New York, approved estimates and maps covering a project for the acquisition of the said property hereinbefore described and appropriated for the acquisition of this and other property situated in the towns of Clarkstown and Orangetown, County of Rockland, State of New York, as shown on a certain key map attached to the memorandum of said action, the sum of six hundred thousand ($600,000) dollars, of which the sum of five hundred thousand ($500,000) dollars was allocated to the acquisition of plaintiff's property.

Fifteenth. On or about October 11, 1928, defendants, Board of Commissioners of Palisades Interstate Park, with the approval of the Honorable Alfred E. Smith, Governor of the State of New York, dated October 10, 1928, executed and served upon plaintiffs a notice that on October 11, 1928, there had been filed in the office of the Secretary of State of the State of New York a description of land, certified to be correct, upon which was endorsed a notice that the property

described therein, being the property of the plaintiffs hereinbefore described, had been appropriated by the People of the State of New York for public and state park purposes pursuant to chapter 242, of the Laws of 1928, and other applicable laws of the State of New York with the approval of the Governor.

Sixteenth. On or about October 11, 1928, and purporting to act under and by virtue of authority vested in them by chapter 242 of the Laws of 1928 of the State of New York and said notice dated October 10, 1928, defendants, Board of Commissioners of Palisades Interstate Park, wrongfully [fol. 14] entered upon the said real property of plaintiffs and converted the personal property thereon to their own use and have since remained in possession of said real and personal property and prevented its use, enjoyment, occupation and operation by plaintiffs for any purpose to plaintiffs' great and continuing damage.

Seventeenth. Section 4, Article VII of the Constitution of the State of New York forbids the creation of state debts save to meet casual deficits or for state defense unless authorized by statute submitted and approved by the people at a general election and only in accordance with such statute so approved. Chapter 602 of the Laws of 1924 provided for the creation of such a debt, a portion of the proceeds of which were made applicable to the Palisades Interstate Park, such moneys to be expended and lands acquired by the Commissioners of the Palisades Interstate Park Commission under the provisions of Chapter 170 of the Laws of 1900 as amended. Chapter 170 of the Laws of 1900 contained no provision for acquisition of lands by entry and appropriation. Chapter 602 of the laws of 1924 was subsequently approved at the general election held in November, 1924. Thereafter Chapter 170 of the Laws of 1900 was wholly repealed by Chapter 242 of the Laws of 1928 which enacted the legislation under which defendants, Board of Commissioners of Palisades Interstate Park, have assumed to act in entry and appropriation of plaintiffs' property. The attempted allocation of five hundred thousand ($500.-000) dollars to such acquisition of said property is therefore void and of no effect, and no sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation.

Eighteenth. Section 21 of Article III of the Constitution of the State of New York provides that an appropriation act making a new appropriation or continuing or reviving an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied. The Referendum Act of 1924, Chapter 602, allocated three million five hundred thousand ($3,500,000) dollars for the acquisi- [fol. 15] tion of lands by the Board of Commissioners of the Palisades Interstate Park for park purposes. By Chapter 16 of the Laws of 1926, said monies were provided and made available for the purpose of acquiring, by the Palisades Interstate Park Commissioners, lands pursuant to Chapter 170 of the Laws of 1900 as amended. Chapter 75, part 5, of the Laws of 1928, purports to reappropriate the said sum, yet it fails to comply with the requirements of said section 21 of Article III of the Constitution of the State of New York in that it fails to specify the object to which the sum appropriated is to be applied. Therefore, Chapter 75, part 5, insofar as it attempted to reappropriate the monies allocated for such park purposes by the Referendum Act of 1924, is unconstitutional and void, and this fund described therein as the "State Park System Fund" is unavailable to the Commissioners of the Palisades Interstate Park as no legal reappropriation of said monies had been made by the Legislature and no payment had been made within two years next after the passage of the Appropriation Act of 1926, being Chapter 16 of Laws of 1926.

Nineteenth. The real property hereinbefore described and the said leasehold attempted to be acquired as aforesaid were and now are of a value greatly in excess of five hundred thousand ($500,000) dollars, the amount purported as aforesaid to have been appropriated for its acquisition, being of the value at present in excess of three million ($3,000,000) dollars.

Twentieth. Plaintiffs are daily suffering great loss from the continued unlawful occupation of their property, deterioration of buildings and machinery and impossibility of operation. The aggregate loss so incurred will amount to such sum that the damage would be irreparable and destructive of plaintiffs' property. Plaintiffs are therefore without adequate remedy at law for redress of the wrong to

which they and each of them have been and are being subjected.

Twenty-first. The authorized capital stock of pliantiff, Sparkill Realty Corporation, is $30,000 divided into 3,000 [fol. 16] shares of no par value, all of which shares have been issued and outstanding.

Twenty-second. The capital stock of plaintiff, Standard Trap Rock Corporation, is 10,000 shares of eight (8%) per cent preferred stock of $100 par value, of which 7,152 shares have been issued and outstanding, and 18,000 shares common stock of no par value, of which 15,152 shares have been issued and outstanding.

Twenty-third. The value of the plaintiffs' property and business involved in this action greatly exceeds the sum of $3,000.

Twenty-fourth. To the end that plaintiffs may have that relief which they can obtain only in a court of equity and that defendants may answer the premises but not under oath or affirmation, the benefit whereof the plaintiffs hereby expressly waive, plaintiffs hereby respectfully pray:

1. That it be adjudged that Article XVI, section 745-760 of the Conservation Law of the State of New York, being part 9 of Chapter 242 of the Laws of 1928 of the State of New York, being an act entitled, "An Act to amend the Conservation Law, generally, and to conform the same to the State Departments Law and repealing certain provisions of Article VIII of the State Departments Law, and certain other statutes," which became a law March 5, 1928, and that a certain notice, description and certificate of defendants, Board of Commissioners of the Palisades Interstate Park Commission, dated October 11, 1928, with reference to the real and personal property hereinbefore described, and the acts of the defendants thereunder, are invalid as violative of the provisions of section 10 of Article I of the Constitution of the United States of America and of section 1, Articles XIV, of the Articles in addition to, and amendment of the Constitution of the United States of America and of section 6 of Article I and section 4 of Article VII of the Constitution of the State of New York.

2. That it be adjudged that Chapter 75, part 5, of the Laws of 1928, insofar as it relates to the "State Park Sys-
[fol. 17] tem Fund" and the reappropriation of $11,912,-850.58, is invalid as violative of the provisions of section 21, Article III, of the Constitution of the State of New York.

3. That it be adjudged and decreed that plaintiffs have no adequate remedy at law for the damage and injury which will result from the enforcement of said act, notice, certificate and description, and that the same will be irreparable.

4. That plaintiffs be granted a writ of injunction issued out of and under the seal of this Honorable Court against defendants forever restraining them and each of them, and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of said act of the Legislature of the State of New York or said notice, description or certificate of defendants, Board of Commissioners of Palisades Interstate Park, and from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for non-compliance by plaintiffs with said act, notice, description or certificate or from continuing in possession of plaintiffs' said property.

5. That plaintiffs be granted a writ of subpœna ad respondendum issued out of and under the seal of this Honorable Court directed to the defendants commanding them and each of them on a day certain and under a certain penalty to be therein inserted to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises and further to stand, do, perform and abide by such further order and decree as to this Honorable Court may seem meet.

6. That plaintiffs may have such other, further or different relief as may seem meet and the nature of this

[fol. 18] suit and equity may require and grant, together with costs and disbursements of this suit, and the plaintiffs will ever pray.

Sparkill Realty Corporation, by John Otto, President. Standard Trap Rock Corporation, by James G. Shaw, Vice-President. Henry J. Hemmens, Solicitor for Plaintiff Sparkill Realty Corporation. Office and P. O. Address: 43 Cedar Street, Borough of Manhattan, City of New York. Timothy J. Shea, of the Firm of Cullen and Dykman. Cullen and Dykman, Solicitors for Plaintiff Standard Trap Rock Corporation. Office and P. O. Address: 177 Montague Street, Borough of Brooklyn, City of New York. Henry J. Hemmens, Jackson A. Dykman, Timothy J. Shea, of Counsel.

[fols. 19 & 20] *Duly sworn to by John Otto and James G. Shaw. Jurat omitted in printing.*

[fol. 21] EXHIBIT A TO BILL OF COMPLAINT

Agreement, made this 19th day of May, 1927, between Sparkill Realty Corporation, a New York Corporation, having an office at 17 West 44th Street, in the City of New York, first party, and Standard Trap Rock Corporation, a New York Corporation, having an office at No. 26 Cortlandt Street, in the City of New York, second party,

Witnesseth:

That the first party in consideration of the issuance to it of a certificate for 2,000 shares of the common stock of the second party (receipt of which is acknowledged) and in further consideration of the covenants and agreements of the second party herein expressed hereby leases to the second party and the second party hereby hires from the first party all that certain tract of land at Sparkill in Rockland County in the State of New York owned by the first party and more fully described in the attached Exhibit A for the purpose of mining, quarrying and removing trap rock therefrom and with the right and privilege to construct, make, operate and maintain all such buildings, excavations, openings, ditches, drains, railroads,

canals, wagon-roads, crushing plants and other improvements and workings upon said premises as the second party may from time to time deem necessary or suitable for the removal of trap rock therefrom.

To have and to hold said premises unto the second party and its successors and assigns for the uses and purposes aforesad during the period of twenty years from the 1st day of January 1928.

The parties hereto for themselves and their respective successors and assigns covenant and agree as follows:

First. The second party will pay to the first party a royalty on the basis and at the rates hereinafter provided but which shall in any event be not less than a minimum annual royalty of $35,000. The royalty shall be based upon the quantity of trap rock removed during each year and [fol. 22] shall be at the rates of seven cents per cubic yard up to and including 500,000 cubic yards and six cents per cubic yard on all over 500,000 cubic yards up to and including 600,000 cubic yards and five cents per cubic yard on all over 600,000 cubic yards.

The royalty shall be payable in quarterly instalments on or before the twentieth day of each April, July, October and January commencing April 20, 1928 and ending January 20, 1948. Each such quarterly instalment shall be based upon the quantity of trap rock removed during the three calendar months next preceding the month in which such instalment is so payable but shall in any event be not less than one-quarter of the minimum annual royalty. The first party acknowledges receipt on the signing of this agreement of $8,750 as full payment in advance of the quarterly instalment of the minimum royalty due April 20, 1928.

Whenever on any such quarterly payment date the instalment of royalty which would be then due if computed solely on the basis of trap rock removed during the preceding quarterly period shall be less than $8,750, the difference shall constitute a credit against (and may be deducted by the second party from) any amount by which the royalty for any one or more subsequent quarterly periods shall exceed the minimum royalty for such period or periods.

Second. Whenver used in this Agreement the word "year" means "calendar year" and the term "cubic yard" refers exclusively to measurement after crushing.

Third. The second party will build and equip a plant upon the premises of the capacity of not less than five hundred thousand (500,000) cubic yards per annum.

Fourth. Any riparian or wharfage rights in connection with the premises which the second party shall consider it necessary to lease shall be leased by the second party at its own expense and any such rights which the second party shall consider it necessary to purchase shall be paid for by the second party but title thereto shall be vested in the first party. Any such rights so vested in the first party [fol. 23] shall automatically become included in this lease and the first party will execute and deliver any such instrument supplemental hereto as shall be reasonably requested for the purpose of effecting that result.

Fifth. The second party will cause all trap rock removed from the premises to be measured (after crushing) by said second party or by the transportation company which removes the same, and will furnish the first party each month with a certificate or statement showing the amount of all such trap rock removed and transported during the preceding month. All such monthly statements shall be delivered or mailed to the first party at its address in New York City. The first party shall have the right on request and at reasonable hours to examine second party's books and records if deemed necessary to verify the same.

Sixth. The second party will pay all water bills, taxes and assessments, general and special, which may be levied or assessed against said premises or the improvements thereon, or any product thereof, or any personal property thereon, during the continuance of this lease, and before said taxes or assessments become delinquent, and will furnish the first party with duplicate tax receipts showing the payment of all such assessments and taxes; provided however that the second party shall have the right in its own name or in the name of the first party but at its own expense to contest in good faith and by appropriate proceedings any such assessment or tax and shall not be required

to pay any assessment or tax so contested until the final determination of such proceedings; and provided further that the amount of any refund which may be paid to the first party on account of any assessment or tax paid by the second party shall (after deducting therefrom any expense incurred by the first party in obtaining the same) be paid over to the second party.

Seventh. Unless of fire proof construction the plant and all machinery and buildings on the premises which are necessary to the conduct of the business are to be insured [fol. 24] and kept insured against fire by the second party and its successors and assigns, the loss if any being made payable to the first party, its successors or assigns. Whenever the amount of any loss paid to the first party under such insurance shall be less than $5,000 the first party will forthwith pay over the same to the second party. Whenever the amount of any loss so paid to the first party shall exceed $5,000 the first party will (unless otherwise mutually agreed between the parties hereto) forthwith deposit the same in escrow in the Fulton Trust Company in New York City or in such successor bank or trust company as shall be then continuing the business of the Fulton Trust Company. The escrow depositary shall dispose of such funds in the following manner:

(a) If within thirty days from the making of the escrow deposit the second party shall notify the depositary that the second party desires to repair or replace the property on account of which such loss was paid then the depositary shall thereafter from time to time pay over to the second party out of such deposit such amounts as the second party shall certify to the depositary as being due or as having been incurred for such repairs or replacements. Each such certificate is to be signed by two of the officers of the second party. If at the expiration of six months from the making of the escrow deposit there shall remain any balance thereof which the second party shall not have applied for as provided in this subdivision (a) then the depositary shall forthwith pay over such balance to the first party.

(b) If at the expiration of thirty days from the making of the escrow deposit the second party shall not have

given to the depositary the notice provided for above in (a) then the depositary shall forthwith pay over to the first party the amount of the escrow deposit.

Eighth. At the time of making each escrow deposit provided for above in Article Seventh the first party will sign and deliver to the depositary a letter of escrow instructions [fol. 25] which shall set forth an exact copy of Article Seventh and which shall otherwise be of substantially the following tenor:

"We herewith deposit with you in escrow the sum of $—, which represents the amount of fire insurance loss paid to us pursuant to the provisions of Article Seventh of an agreement dated April —, 1927, between the undersigned, as first party, and Standard Trap Rock Corporation, as second party. The property on account of which such loss was paid is ——

The following is an exact copy of Article Seventh of said agreement:

(Take in copy.)

We request you to hold and dispose of the escrow deposit as provided in the above quoted Article Seventh. The address of Standard Trap Rock Corporation is ——."

Nothing in this agreement contained shall in any way restrict the right of the second party to effect insurance for its sole benefit and protection upon all property on the premises (other than as specified above in Article Seventh) and against operating losses or loss of profits resulting from damage or destruction by fire or other means.

Ninth. Upon the termination of this lease, the second party shall quietly and peaceably surrender possession of said premises to the first party, but said second party shall have the right within six months thereafter, provided it has paid all royalty and rent due under the terms of this lease, and has otherwise performed all of the covenants and agreements herein expressed, to remove all fixtures and other property of every kind owned by it and placed or erected upon said premises.

Tenth. The first party and its assigns shall at all times have, possess and hold a lien upon all machinery, imple-

ments and personal chattels and buildings and sheds of the second party that shall be upon said premises as security [fol. 26] for the faithful preformance and discharge of all agreements, covenants and conditions herein contained, binding upon the second party, and for the payment of rents, royalties and taxes herein mentioned, and for any money that may be in any manner due or owing from the second party to the first party, and if default be made in the payment of any such rent, royalty, taxes or any moneys or any part of any instalment thereof, or in the performance or discharge of any of the agreements, covenants or conditions herein contained, the first party is hereby authorized to enter upon said premises and into, upon any place where said machinery, implements and personal property may be, and take the same into its possession, and to sell and dispose of the same at public sale in the manner provided by law for sales of pledged property or under chattel mortgage, and out of the moneys arising from such sale, to retain the sum or sums due, whether for damages or otherwise, together with interest thereon, and all costs and expenses of such sale, rendering the surplus, if any, to the second party.

Eleventh. The first party expressly reserves the right, by its duly authorized agents, to enter into and upon the above described premises, and every portion thereof, at any and all times for the purpose of inspecting and surveying the same and measuring the quantity of trap rock that shall have been removed therefrom, not unnecessarily or unreasonably hindering or interruping the lawful operations of the second party.

Twelfth. If the rent or royalty herein provided for, or any taxes or assessments, or any part thereof, shall remain unpaid after the dates and times herein specified, or in case the second party shall fail to keep or perform any of the covenants and conditions herein expressed by it to be kept or performed, and if such non-payment of rent or royalties, or other default hereunder, shall continue for thirty (30) days after the first party shall have given the second party written notice thereof, specifying its nature, then and from thenceforth and in either of such cases, it shall be lawful for [fol. 27] the first party to declare this lease terminated and the rights of the second party hereunder forfeited, to take

possession of the leased premises, or any part thereof, and without any process whatever, to re-enter said lands and premises and to possess again, as fully and completely as though this lease had not been executed, and the second party and all persons and parties claiming under it to wholly exclude therefrom.

Thirteenth. The second party may, at its option, renew this lease for a period of twenty (20) years from the expiration hereof, on the same terms and conditions, upon first giving to the first party not less than six (6) months' notice in writing, previous to the expiration of this lease, of its intention so to do.

Fourteenth. The second party shall not permit or suffer any unreasonable waste of trap rock upon said premises. Until the above mentioned plant shall have been completed and operated for the period of two years the second party shall not sublet or underlet the premises, or any part thereof, nor suffer any other person or persons to use or occupy the same, nor assign this lease, or any interest therein, except with the consent of the first party first obtained in writing.

Fifteenth. The second party may without any payment therefor, except as hereinafter provided, have possession of the premises during any portion of the period between the execution of this agreement and January 1st, 1928, for the purpose of constructing the plant to be erected thereon, and for the purpose of excavation and removing trap rock. For the privilege of such possession and uses the second party will pay to the first party the proportionate amount of all taxes and assessments as above provided for such preliminary period and will also pay to the first party on all trap rock removed from the premises during such preliminary period a royalty which shall be paid at the same times and computed in the same manner as hereinabove [fol. 28] provided except that there shall be no minimum royalty payable on account of such preliminary period.

Sixteenth. If the first party shall own at the time of the signing of this agreement or shall during the period of this lease acquire the tract of land designated as lot No. 35 on the map or plot referred to in Exhibit A such tract shall

thereupon be included in this lease. If at any time during the original or renewal term of this lease the second party shall desire to have included in this lease any tract or tracts of land adjoining the leased premises the second party shall so notify the first party and permit the first party to negotiate for the purchase thereof. If the first party shall be able to effect the purchase on terms acceptable to it and if the second party shall make available to the first party such advance payment on account of royalty hereunder as the first party shall require for its assistance in financing such purchase then the first party will effect such purchase and the lands so purchased shall forthwith become included in this lease to the same extent as though herein originally described. The first party will on request execute and deliver to the second party such supplemental instruments as may be reasonably requested for effecting the provisions of this Article Sixteenth.

Seventeenth. The first party warrants and covenants that it owns title to said premises in fee simple subject to no defects or liens or encumbrances whatsoever except as stated in Exhibit A and that the second party while not in default hereunder shall quietly enjoy said premises for the period and upon the terms and conditions hereinabove provided.

Eighteenth. The provisions of this agreement shall bind and benefit the respective successors and assigns of the parties hereto.

[fol. 29] In witness whereof, this agreement has been executed in duplicate by the parties hereto the day and year first above written.

Sparkill Realty Corporation, by John Otto, President. Attest: Walter Barnwell, Secretary. (Corporate Seal.) Standard Trap Rock Corporation, by W. Butler Duncan, President. Attest: Anderson Dana, Secretary. (Corporate Seal.)

[fol. 30] State of New York,
County of New York, ss:

On this 19th day of May, 1927, before me personally came John Otto to me known, who, being by me duly sworn, did depose and say that he resides in New York City, N. Y.;

that he is the President of the Sparkill Realty Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

John B. Purcell, Notary Public, New York County, No. 285. Register No. 9269. Bronx Register No. 2968. Kings Co. Register No. 9179. Queens Register No. 4104. Commission expires March 30, 1929. (Notarial Seal.)

[fol. 31] STATE OF NEW YORK,
County of New York, ss:

On this 19th day of April, 1927 before me personally came W. Butler Duncan, to me known, who, being by me duly sworn, did depose and say that he resides in New York City, N. Y., that he is the President of Standard Trap Rock Corporation the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

John B. Purcell, Notary Public, New York County, No. 285. Register No. 9269. Bronx Register No. 2968. Kings Co. Register No. 9179. Queens Register No. 4104. Commission expires March 30, 1929. (Notarial Seal.)

[fol. 32] EXHIBIT A TO AGREEMENT

All those certain lots or parcels of land situate at Piermont, in the Town of Orangetown, County of Rockland and State of New York, and bounded and described as follows:

Beginning at the northwest corner of said parcel at the center of the public road leading to Rockland and running thence South 43½ degrees east 455 feet more or less to a stone set in the fence; thence South 39 degrees 15 minutes west 317 feet to land now or formerly of Rodman G. Moul-

ton; thence along the same as the fence now stands South 40 degrees east 38 feet; thence South 32 degrees east 279 feet; thence South 24 degrees east 175 feet more or less to land formerly of James Iserman, deceased; and southeasterly corner of said land of Rodman G. Moulton; thence along said Moulton's land about South 70 degrees west 16 chains 50 links to the center of the public road leading from Piermont to Rockland; thence along the center of said road South 14 degrees east about 5 chains 30 links; thence along said road South 15 degrees east 3 chains 21 links; thence along said road South 5 degrees west 2 chains and 88 links to a hickory tree; thence along said road South 19 degrees west 1 chain 91 links; thence North 77½ degrees east 18 chains 17 links to a stake on the east side of a small brook; thence South 30½ degrees east 4 chains 30 links to a stone wall; thence South 26½ degrees east 59 links; thence North 55 degrees east 808 feet 6 inches; thence North 20 degrees west 120 feet; thence North 52 degrees east 132 feet; thence South 35 degrees 30 minutes east along the land now or formerly of George A. Jones 904 feet to a cedar tree; thence North 17 degrees west 1,000 feet; thence North 30 degrees west 566 feet to the south side of a spring on land of David Holzworth; thence South 66 degrees west 460 feet; thence North 29 degrees west 90 feet 6 inches to a hickory tree at [fol. 33] the northwest corner of said Holzworth's land; thence North 46¾ degrees east 7 chains 5 links; thence North 19 degrees east 1 chain 56 links; thence North 14¼ degrees east 1 chain 97 links; thence North 22 degrees west 2 chains 10 links; thence North 7 degrees east 5 chains 80 links; thence North 10½ degrees east 4 chains 61 links; thence North 80 degrees east 80 links; thence North 10 degrees west to the Corner Kill; thence along same easterly, southerly and easterly to a meadow late of James C. Smith; thence along the same North 8½ degrees west about 10 chains 65 links to a meadow now or late of Tunis A. Smith; thence North 87 degrees east 2 chains 15 links to a ditch; thence North 10½ degrees west 7 chains 15 links to the Sloat Creek; thence South 39 degrees west 1 chain 59 links; thence South 64¾ degrees west 63 links; thence North 89 degrees west 62 links; thence North 64½ degrees west 77 links to a ditch; thence North 13½ degrees west 2 chains and 68 links; thence North 23 degrees west 2 chains; thence North 53 degrees west 60 links; thence South 80 degrees

west 2 chains 46 links; thence South 59 degrees west 52 links; thence South 32 degrees west 1 chain 37 links; thence South 24 degrees west 88 links; thence South 37 degrees west 1 chain 67 links; thence South 49½ degrees west 1 chain 93 links to a stake at the South side of Sloat or Sparkill Creek east of the lowest bridge and at the east side of a mouth or a ditch leading into the said Sparkill; thence South 69 degrees west along the said Sparkill Creek 5 chains 40 links; thence South 43 degrees east 7 chains 50 links to a stake in a stone heap; thence South 44¼ degrees west 12 chains 36 links to the westerly line of land now or formerly of Charles Taulman's; thence along the westerly line of land last mentioned North 49¼ degrees and west to land now or formerly of William Lawrence; thence South 33 degrees west 1 chain 43 links; thence South 40 degrees west 1 chain 45 links to the school lot; thence along the boundary line of the said school lot to the centre of the public road aforesaid; thence along the centre of [fol. 34] said road to the place of beginning. Containing 104 acres and 25/100 of an acre, excepting from the said premises above described a small lot on the Rockland Public road belonging to Maria Briggs; being in dimensions 70 links front and rear by 3 chains 15 links deep.

Also beginning at a stake by the land formerly of Jacob Ackerson and running thence North 25 degrees west 5 chains 35 links to land now or late of James T. Blauvelt, thence North 28 degrees west 6 chains, thence North 17½ degrees west 5 chains 58 links to a stake on line between lands now or formerly of James A. Hopson and Jacob M. Blauvelt; thence along said line South 78 degrees 45 minutes west 815 feet 5½ inches; thence North 18 degrees 30 minutes west 335 8/10 feet to land now or formerly of George A. Jones; thence North 78 degrees 45 minutes east 1,177 feet 5½ inches to the foot of the hill near the spring; thence in a southeasterly direction to a ditch near the foot of the hill; thence along the said ditch South 19 degrees east to a stake 1 chain 6 links in a northerly direction from the southwesterly corner of the salt meadow lot now or late belonging to the heirs of Lawrence Briggs deceased; and thence in a straight line to the place of beginning. Containing 19 acres and 58/100 of an acre.

Also bounded on the east by land formerly of John L. Brownell, on the South by land now or formerly of Jacob

M. Blauvelt, on the west by an old stone ditch and on the north by land now or formerly of George A. Jones. Containing about 1⅓ acres.

Also all that certain piece, parcel or tract of land situate on the easterly side of Tallman's Mountain at or near Piermont, New York, in the Town of Orangetown, County of Rockland, and more particularly bounded and described as follows, viz: First, two acres more or less in Piermont, bounded, north, south and west by land of J. S. Homans and east by Elisha Ruckman against which the name of [fol. 35] "Mrs. Anna Doersch" appears on the assessment roll of said town for the year 1878, and the name "Mrs. Conrad Doersch" in the tax roll of said two of said years and on which a building known as the Lion Brewery was standing in the year 1878 and Second, one and seven tenths acres more or less at or near Piermont bounded, beginning at a hickory tree at the northwest corner thereof, adjoining the land of J. O. Gorham; thence south twenty-five (25) degrees thirty (30) minutes east ninety and one-half (90½) feet to a chestnut tree at the southwest corner thereof; thence north sixty-five (65) degrees east along said Gorham's land four hundred and sixty (460) feet to the Salt Meadows and other land of said Gorham; thence north twenty-seven (27) degrees forty-five minutes west along the same two hundred and thirty-two (232) feet and thence south forty-seven (47) degrees forty-five (45) minutes west along said Gorham's land four hundred and seventy (470) feet to the point or place of beginning. Against which the name of Anna Doersch appears on the tax roll for the year 1872.

Also the following meadow lots as shown on the map of the Orangetown salt meadow, made by James S. and James S. Harring, Jr., Surveyors, in October 1877, a copy of which map is filed in the Town Clerk's office in the town of Orangetown and also in the Comptroller's office in the State of New York, at Albany, as follows:

Lots in the Tappan tract of the Orangetown map: 1, 2, 5, 6, 7, 8, 16, 17, 18, 21, 22, 22a, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 45, 47, and 57.

The title to the upland was obtained through warranty deeds.

The title to the meadow lots was obtained from the Standard Oil Company, which Company got its title through tax

deeds. Some of these lots were obtained by the Sparkill Realty Company from Antoinette E. Wood.
[fol. 36] If the title to lot 35 in Tappan tract in the salt meadows is obtained by the Sparkill Realty Corporation, it will be leased or may be included in the lease about to be signed.

EXHIBIT B TO BILL OF COMPLAINT

Supplemental agreement, made this 19th day of May, 1927, between Sparkill Realty Corporation, a New York Corporation, having an office at 17 West 44th Street, in the City of New York, first part, and Standard Trap Rock Corporation, a New York Corporation, having an office at 26 Cortlandt Street, in the City of New York, second party,

Witnesseth:

That in reliance upon the prior undertaking of the first party to execute and deliver this supplemental agreement second party has entered into and executed with the first party an agreement bearing even date herewith and hereinafter called the Lease.

Therefore the parties hereto for themselves and their respective successors and assigns covenant and agree as follows:

1. The provisions of paragraph first of the Lease are hereby modified in the following respects:

(a) If at any time prior to April 20, 1928 proceedings shall be commenced by the Palisades Park Commission for the condemnation of the leased premises or any substantial portion thereof then the minimum annual royalty provided for in the Lease shall not become effective unless and until such proceedings shall have been finally discontinued or finally terminated adversely to the said Park Commission and ten calendar months shall have elapsed subsequent to the month in which such final discontinuance or adverse termination occurred. Upon the expiration of such ten [fol. 37] months period the said minimum royalty shall become effective and the first instalment thereof shall be paid (less the advance payment of $500 hereinafter referred to) pro rata from the expiration of such ten months period to

the next succeeding quarterly payment date provided for in the Lease.

(b) The cash amount payable by the second party upon the signing of the Lease is hereby reduced from the full amount of the first quarterly instalment of said minimum royalty ($8,750) to a part payment of $500 on account of such first quarterly instalment receipt of which is hereby acknowledged by the first party.

2. Subject to the foregoing modifications all of the terms and provisions of the Lease shall remain in full force and effect.

In witness whereof the parties hereto have duly executed these presents the day and year first above written.

Sparkill Realty Corporation, by John Otto, President. Attest: —— ——, Secretary. (Seal.) Standard Trap Rock Corporation, by W. Butler Duncan, President. Attest: Anderson Dana, Secretary.

[fol. 38] State of New York,
County of New York, ss:

On this 19th day of May, 1927, before me personally came John Otto, to me known, who being by me duly sworn, did depose and say; that he resides in New York City, N. Y.; that he is the President of Sparkill Realty Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

John B. Purcell, Notary Public, New York County, No. 285. Register No. 9269. Bronx Register No. 2968. Kings Co. Register No. 9179. Queens Register No. 4104. Commission expires March 30, 1929. (Seal.)

[fol. 39] State of New York,
County of New York, ss:

On this 19th day of May, 1927 before me personally came W. Butler Duncan, to me known, who being by me

duly sworn, did depose and say; that he resides in New York City, N. Y.; that he is the President of Standard Trap Rock Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

John B. Purcell, Notary Public, New York County, No. 285. Register No. 9269. Bronx Register No. 2968. Kings Co. Register No. 9179. Queens Register No. 4104. Commission expires March 30, 1929. (Seal.)

[fol. 40] EXHIBIT C TO BILL OF COMPLAINT

Second Supplemental Agreement, made October 19, 1927, between Sparkill Realty Corporation, a New York corporation, having an office at 17 West 44th Street, in the City of New York, first part, and Standard Trap Rock Corporation, a New York corporation, having an office at 26 Cortlandt Street, in the City of New York, second party:

Under date of May 19, 1927 the parties hereto entered into an agreement (hereinafter called the Lease) by which the first party leased its property at Sparkill in Rockland County in the State of New York to the second party for a term of twenty years from the first day of January, 1928, with permission to the second party to occupy and operate the property prior to January 1, 1928 and with the provision that the quarterly instalment ($8,750) of the minimum royalty due April 20, 1928 should be paid in advance upon the signing of the lease.

Simultaneously with the execution of the Lease and because of the fact that on April 13, 1927 counsel for the Palisades Park Commission had notified the first party that the Commission was considering the condemnation of the leased property, the parties hereto entered into a Supplemental Agreement dated May 19, 1927 by which it was provided among other things that if such condemnation proceedings should be commenced at any time prior to April 20, 1928 the minimum royalties provided for in the Lease

should not become effective until the expiration of ten calendar months subsequent to the final discontinuance or final termination of such proceedings adversely to the Commission, and that the amount to be paid by the second party on the signing of the Lease should be reduced to $500 as an instalment in advance on account of the first quarterly instalment of the minimum royalty.

Since the execution of the Lease and the Supplemental Agreement the parties hereto and their counsel have had continuous negotiations and correspondence with the Palisades Park Commission and its counsel and have by mutual [fol. 41] consent considered the action of the Commission as equivalent for purposes of the Lease and Supplemental Agreement to the institution of condemnation proceedings. On October 18, 1927 counsel for the Commission notified counsel for the parties hereto that the Commission had determined to take no steps for the condemnation of the property. The parties hereto recognize however that this notification was given too late to enable the second party to complete construction of the proposed plant in time to take advantage of the 1928 market.

Therefore in consideration of the premises and of the agreements hereinafter contained the parties hereto for themselves and their respective successors and assigns agree as follows:

1. The term or period of the Lease dated May 19, 1927 is hereby extended to twenty years from the first day of October 1928.

2. The second paragraph of Article First of the Lease is hereby modified to read as follows:

"The royalty shall be payable in quarterly instalments on or before the twentieth day of each January, April, July and October commencing January 20, 1929 except that the quarterly instalment ($8,750) of the minimum royalty due January 20, 1929 shall be paid in advance by the second party on or before February 1, 1928. The first party acknowledges and accepts the sum of $500 paid by the second party on the signing of this Lease as a payment in advance on account of the quarterly instalment so payable on or before February 1, 1928."

3. The first sentence of Article Fifteenth of the Lease is hereby modified to read as follows:

"The second party may without any payment therefor except as hereinafter provided have possession of the premises during any portion of the period between October 20, 1927 and October 1, 1928, for the purpose of constructing [fol. 42] the plant to be erected thereon and for the purpose of excavating and removing trap rock."

4. The Supplemental Agreement dated May 19, 1927 is hereby cancelled and is superseded by this Second Supplemental Agreement.

5. Subject to the foregoing modifications all of the terms and provisions of the Lease dated April 19, 1927 shall remain in full force and effect.

In witness whereof the parties thereto have duly executed these presents in duplicate the day and year first above written.

Sparkill Realty Corporation, by John Otto, President. Attest: Walter Barnwell, Secretary. (Seal.)
Standard Trap Rock Corporation, by W. B. Duncan, President. Attest: Anderson Dana, Secretary. (Seal.)

[fol. 43] State of New York,
County of New York, ss:

On this 28th day of October, 1927 before me personally came John Otto, to me known, who being by me duly sworn did depose and say that he resides in New York City; that he is the President of Sparkill Realty Corporation the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

L. S. Donaldson, Notary Public, Nassau County. Certificate filed in New York County. Clerk's No. 277. Register's No. 9228. Commission expires March 30, 1929.

State of New York,
County of New York, ss:

On this 25th day of October, 1927 before me personally came W. Butler Duncan, to me known, who being by me duly sworn did depose and say that he resides in New York City; that he is the President of Standard Trap Rock Corporation the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Edith M. Brown, Notary Public, Kings County, No. 43. Certificate filed New York Co. No. 115. New York County Register's No. 8105. Commission expires March 30, 1928.

[fol. 44] Exhibit D to Bill of Complaint

Third supplemental agreement, made December 1, 1927 between Sparkill Realty Corporation, a New York Corporation, having an office at 17 West 44th Street, in the City of New York, first party, and Standard Trap Rock Corporation, a New York Corporation, having an office at 26 Cortlandt Street, in the City of New York, second party:

The parties hereto desire to modify as hereinafter provided the provisions of an Agreement between the parties dated May 19, 1927 (hereinafter called the Lease) as now modified by the Second Supplemental Agreement between the parties hereto dated October 19, 1927.

Therefore the parties hereto for themselves and their respective successors and assigns agree as follows:

1. Article First of the Lease is hereby amended by adding thereto a paragraph to read as follows:

All royalties herein provided for shall be payable in gold coin of the United States of or equal to the standard of weight and fineness existing May 19, 1927.

2. Article Second of the Lease is hereby modified to read as follows:

Second. Whenever used in this Agreement the word "year" means the twelve months period from October 1 to September 30, both inclusive, and the term "cubic yard" refers exclusively to measurement after crushing.

3. Article Thirteenth of the Lease is hereby modified to read as follows:

Thirteenth. The second party may, at its option, renew this lease for a period of twenty (20) years from the expiration hereof, on the same terms and conditions (except that the provisions of Article Third shall not apply), upon first giving to the first party not less than six (6) months' [fol. 45] notice, in writing, previous to the expiration of this lease, of its intention so to do.

4. Pursuant to the provisions of Article Sixteenth of the Lease the tract of land designated as lot No. 35 on the map or plot referred to in Exhibit A attached to the Lease (which lot the first party represents that it has acquired subsequent to the date of the lease) is included within the lease to the same effect as though originally described in said Exhibit A.

5. Subject to the foregoing modifications all of the terms and provisions of the Lease dated April 19, 1927 as modified by the Second Supplemental Agreement made October 19, 1927 shall remain in full force and effect.

In witness whereof the parties hereto have duly executed these presents in duplicate the day and year first above written.

Sparkill Realty Corporation, by John Otto, President. Attest: Walter Barnwell, Secretary. (Seal.)
Standard Trap Rock Corporation, by W. Butler Duncan, President. Attest: Anderson Dana, Secretary. (Seal.)

[fol. 46] State of New York,
County of New York, ss:

On this 10th day of December, 1927, before me personally came John Otto, to me known, who, being by me duly sworn, did depose and say that he resides in New York City, that

he is the President of Sparkill Realty Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

C. L. Donaldson, Notary Public, Nassau County. Certificate filed in New York County. Clerk's No. 277. Register's No. 9228. Commission expires March 30, 1929.

STATE OF NEW YORK,
County of New York, ss:

On this 8th day of December, 1927, before me personally came W. Butler Duncan, to me known, who, being by me duly sworn, did depose and say that he resides in 115 West 72nd Street, New York City; that he is the President of Standard Trap Rock Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Edith M. Brown, Notary Public, Kings County No. 43. Certificate filed in New York Co. No. 115. New York Co. Register No. 8106. Commission expires March 30, 1929.

[fol. 47] EXHIBIT E TO BILL OF COMPLAINT

October 14, 1927.

Mr. Augustus L. Richards, 100 Broadway, New York City.

DEAR SIR: In reply to your request to the Sparkill Realty Corporation to place a valuation upon its property we beg to state as follows.

The company owns approximately 125 acres of trap rock land with fifty acres of meadow lots with a cliff frontage of about a mile and a river frontage of one thousand feet. A

very large amount of trap rock can economically and easily be removed from t..e property. The property is under lease to the Standard Trap Rock Company for a period of 20 years with a right of renewal of an additional 20 years. The Trap Rock Company is under obligation to install machinery and apparatus upon the property, having an annual capacity of not less than 500,000 cubic yards. A royalty payment of $35,000 is to be paid to the Sparkill Realty Corporation upon the basis of 500,000 cubic yards annually and for production in excess of that amount 6% royalty is to be paid up to 600,000 cubic yards and 5¢ on any excess over that amount. We understand that the cost of machinery and apparatus, including incidental expenses, will amount to approximately $800,000. The property is within a short distance of the City of New York and contains the best trap rock quarry within a reasonable distance of the city. There is a large market for the trap rock and there is no question that a considerable profit will be made upon the sale of the trap rock.

We believe that the income by reason of the lease by the Sparkill Realty Corporation to the Standard Trap Rock Company will approximate $80,000 annually.

In addition to the value of the trap rock the value of the water front property with the thousand feet frontage on the river and fifty acres in one block is very large.

[fol. 48] As the demand for crushed stone in the metropolitan district is so great and is growing yearly, we feel that the lessee will be forced to increase its capacity far beyond that provided in the lease in order to meet the demand.

We believe that the value of the property owned by the Sparkill Realty Corporation is not less than $3,000,000 and that this valuation can be legally established. The lease to the Trap Rock Company was entered into more than seven months ago. The delay in the operation of the plant has already caused the Sparkill Corporation considerable damage.

Very truly yours, —— ——.

HJH:D.

Standard Trap Rock Corporation

Statement, Oct. 12, 1928

		Incurred	Paid	Balance
Rockland L. & P. Co		$50,000.00	$40,000.00	$10,000.00
Burrell Eng. & Cons. Co. (Plant Cons.)	$375,000.00			
Burrell Eng. & Cons. Co. (Extra work Silo #5)	3,778.62			
Burrell Eng. & Cons. Co. (Extra work tunnel)	1,603.53			
		380,382.15	293,250.00	87,132.15
Allis-Chalmers Mfg. Co. (Crushing Mach. & Screens)	$211,725.00			
Allis-Chalmers Mfg. Co. (Transformer changes)	1,458.00			
Allis-Chalmers Mfg. Co. (Control equip. changes)	150.00			
Allis-Chalmers Mfg. Co. (Conveyors)	50,000.00			
Allis-Chalmers Mfg. Co. (Conveyor changes)	1,172.00			
		264,505.00	125,182.55	139,322.45
Marion Steam Shovel Co. (Electric shovels)		99,800.00	5,400.00	94,400.00
Milwaukee Elec. Crane Co		10,000.000	10,000.00	.....
Robins Conveying Belt Co. (Belts)		22,398.67	.....	22,398.67
Robins Conveying Belt Co. (Gyrex screens)		8,000.00	.....	8,000.00
Bickel Dredging Co		16,437.84	16,437.84	.....
Development		42,252.08	42,252.08	.....
Organization		4,425.82	4,425.82	.....

Auto truck		5,300 00	5,300 00	....
Office Furniture & Fixtures		568 12	568 12	....
Buildings		1,197 28	1,197 28	....
Equipment		17,137 29	17,137 29	....
Taxes		90 00	90.00	....
Anderson Dana.	Interest	104 57	.....	104 57
W. B. Duncan	Interest	50 93	.....	50 93
Jas. G. Shaw.	Interest	50 10	.....	50 10
		$922,699 85	$561,240 98	$361,458 87

[fol. 50] EXHIBIT G TO BILL OF COMPLAINT

Conservation Department, Division of Parks, State Council of Parks

Acting under the provisions of Section 4, Chapter 16 of the Laws of 1926, reappropriated Chapter 75, Part 5, of the Laws of 1928.

Pursuant to the provisions of Section 4 of Chapter 16 of Laws of 1926, reappropriated Chapter 75, Part 5 of the Laws of 1928, the State Council of Parks, Division of Parks, Conservation Department at a regular meeting held at Watkins Glen State Park, Schuyler County, New York, Saturday, September 29, 1928, approved estimates and maps covering the following project for acquisition of land, which project was also duly submitted to the Governor, the Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee and received their approval.

Conservation Department, Division of Parks, State Council of Parks, by Robert Moses, Chairman. Henry F. Luts, Secretary.

Dated September 29, 1928.

Committee on Approval of Park Estimates and Maps Consisting of the Governor, the Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee Acting under the Provision of Section 4, Chapter 16 of the Laws of 1926. Reappropriated Chapter 75, Part 5, of the Laws of 1928.

Pursuant to the provisions of Section 4, of Chapter 16 of Laws of 1926, reappropriated Chapter 75, Part 5 of the Laws of 1928, we, the undersigned, do hereby approve the following parks project for acquisition of land which together with the maps and estimates have been submitted by the State Council of Parks, Division of Parks, Conservation Department:

II

Project E, Land Acquisition, Palisades Interstate Park

Acquisition of any or all lands (including lands under water) with the jurisdiction of the Commission, as defined

by Chapter 242, Laws of 1928, in the towns of Clarkstown and Orangetown, County of Rockland, State of New York, as shown on key map which is attached, $600,000.

(Signed) Alfred E. Smith, Governor. C. J. Hewitt, Chairman Senate Finance Committee. Eberly Hutchinson, Chairman Assembly Ways and Means Committee.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES G. SHAW

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

James G. Shaw, being duly sworn, says:

I am Vice-President and General Manager of Standard Trap Rock Corporation, one of the plaintiffs in this suit and have been personally engaged in all the matters and have personal knowledge of all the facts hereinafter set forth.

My experience in stone quarrying extends over a period of about forty (40) years during which I have been engaged almost continuously in the business.

[fol. 52] I graduated in 1885 as a civil engineer at the National Normal University, Ohio, and entered the employ of Carbon Limestone Company, Lawrence County, Pennsylvania, becoming accountant for the Company in 1886 and serving as Vice-President and General Manager of the Company from 1887 to 1896. In 1896 I built and operated an extensive stone plant in Blair County, Pennsylvania. From 1897 to 1901 I was Vice-President and General Manager of the Hudson River Stone Supply Company at Clinton Point, New York, operating dolomite quarries at Clinton Point. In 1901 I organized the Clinton Point Stone Company and operated it as General Manager until 1911. In 1901 this Company acquired the dolomite quarries at Clinton Point of the Hudson River Stone Supply Company; in 1902 a trap rock quarry at Guttenberg, New Jersey, and

leased a limestone quarry at Verplanck's Point, and in 1903 a trap rock quarry at Hook Mountain, later acquired by the Board of Commissioners of the Palisades Interstate Park and a granite quarry at Round Island, below Bear Mountain. From 1911 to 1919 I was Vice-President and General Manager of the Upper Hudson Stone Company; bought and operated the quarries at Clifton Point and Marlborough and operated the leased quarry at Verplanck's Point, and on January 1, 1919, sold out to the New York Trap Rock Corporation. From 1919 to 1922 I was Vice-President and Operating Manager of the New York Trap Rock Company. In 1922 I organized and have since served as Vice-President and Manager of Seaboard Sand & Gravel Corporation which operates the sand and gravel property at Port Jefferson, Long Island, hereinafter mentioned. Plaintiff, Standard Trap Rock Corporation, was organized under the Stock Corporation Law by my associates and me and was incorporated May 17, 1927.

As Vice-President and General Manager of Plaintiff, Standard Trap Rock Corporation, I had supervision and direction of the plans for the development of the property involved in this suit, making repeated examinations and inspections of the property and plant and from my experience in the acquisition, development and operation of trap rock quarries along the Hudson River am of opinion:

[fol. 53] 1. That the Tallman quarry site contains more than forty million cubic yards, after crushing, of trap rock of the highest quality and grade, all of which is readily and practically available for quarrying and crushing.

2. The plant of plaintiff, Standard Trap Rock Corporation, in design, material and arrangement conforms to the most modern and efficient methods of stone crushing and would be adequate for and capable of crushing, conveying and storing approximately seven hundred and fifty thousand cubic yards of trap rock from the adjacent quarry annually.

3. The proposed conveyor system and dock would furnish proper and adequate method for conveying crushed rock from silos and loading the same on scows to the full capacity of the plant.

4. The entire annual capacity of the plant can be mined, crushed, loaded on scows and brought to New York at an average cost of about $.98 per cubic yard, which if increased $.15 per cubic yard to $1.13 per cubic yard would yield a profit of — least $.72 per cubic yard on the basis of an average selling price of $1.98 per cubic yard. The current market prices of the product range from about $1.90 to $2.40, making a profit on seven hundred and fifty thousand cubic yards per annum of well over $500,000.

5. The market for the entire output of the quarry plant is assured by reason of the demand which, as well as the market price, has been increasing for a considerable number of years. Practically all of the crushed stone now used in the New York market is supplied by the New York Trap Rock Corporation of which I was for several years Vice-President and Operating Manager and in this connection I refer to the statement contained in a letter dated December 15, 1926 from Wilson P. Foss, Chairman of the Board of the New York Trap Rock Corporation to bankers purchasing its issue of First Mortgage Bonds as follows:

"The demand for products of the company is constantly increasing and, for each of the years since the organization of the New York Trap Rock Corporation, has been in excess of production. Government statistics indicate the [fol. 54] value of crushed stone used in 1900 as $6,525,000 as compared with similar figures for 1924 of $73,681,576."

The property of plaintiff, Sparkill Realty Corporation, came to the attention of my associates and myself in 1925. We have been successfully operating a sand and gravel property at Port Jefferson, Suffolk County, New York, since 1922. Shortly after the establishment of this business it was found that many customers needed broken stone. The purchasers of the trap rock quarry formerly operated by us then refused to sell their product to customers using our gravel.

In many contracts, among others those for the construction of New York State highways, there is specified broken stone and gravel cannot be used, making it necessary to obtain a trap rock quarry for operation in cooperation with our gravel business.

After prolonged consideration and careful examination and inspection extending over a period of about two years, the quarry property involved in this suit and described in the bill of complaint on the western bank of the Hudson River was leased.

On or about April 13, 1927 plaintiff, Sparkill Realty Corporation, entered into a written agreement with my associate, Anderson Dana, individually, in which it granted an option for the lease of the said property for a period of sixty days. Thereafter, on May 17, 1927 plaintiff, Standard Trap Rock Corporation, was incorporated under the Stock Corporations Law of the State of New York by the filing of a certificate, and on May 19, 1927 its organization was completed by the election of W. Butler Duncan as president, James G. Shaw as vice-president and Anderson Dana as secretary and treasurer.

Thereafter on May 19, 1927 an agreement of lease was executed between plaintiff, Sparkill Realty Corporation, and plaintiff, Standard Trap Rock Corporation, under which the property described in the complaint was leased to plaintiff, Standard Trap Rock Corporation, for a period [fol. 55] of twenty years from January 1, 1928, with a privilege of renewal for twenty years, for quarry purposes, upon the terms contained in said written lease. Supplemental agreements in writing were thereafter made between plaintiffs, the first being dated May 19, 1927, the second October 19, 1927 and the third December 1, 1927. Copies of the said agreement of lease and supplemental agreements are annexed to the bill of complaint marked Exhibits "A," "B," "C" and "D" and made a part thereof.

On June 11, 1927 Messrs. Hughes, Rounds, Schurman & Dwight, counsel for defendants, Board of Commissioners of Palisades Interstate Park Commission, notified plaintiffs that on May 7, 1927 a resolution had been adopted by the defendants, Board of Commissioners of Palisades Interstate Park, directing preliminary steps be taken towards the acquisition of the property described in the complaint for park purposes and that the property to be acquired consisted of the meadowlands and uplands to the top of the cliff.

On June 14, 1927 Messrs. Appleton, Rice and Perrin, acting as attorneys for plaintiff, Standard Trap Rock Corporation, communicated with said counsel for defendants, Board of Commissioners, in writing acknowledging receipt of the said previous communications and stating that on April 13, 1927 deponent had obtained the said option, that the said lease had subsequently been made, that a considerable expense had already been incurred and substantial commitments assumed, including an undertaking to equip and complete a large plant, and further stating that "in this situation if the property is to be condemned Standard Trap Rock Corporation naturally wishes to avoid further expense in so far as compatible with its obligations under the lease."

On July 6, 1927 Augustus L. Richards, Esq., a member of the firm of Hughes, Rounds, Schurman & Dwight, communicated in writing to Edwin T. Rice, Esq., a member of the firm of Appleton, Rice & Perrin, that he had conferred with the defendant White and that it would be impossible to advise when proceedings for the acquisition of the property would be commenced, "further than to say that the [fol. 56] Commission expects to proceed with reasonable expedition in performance of its own functions and duties in the premises."

On July 12, 1927 Mr. Rice advised Mr. Richards that plaintiff, Standard Trap Rock Corporation, was ready and willing to appear before the Commission and, after several postponements, at the request of Mr. Richards blue-prints were forwarded showing test borings on the meadow and permission was granted to defendants, Board of Commissioners, to make such borings. Correspondence between the attorneys for the respective parties ensued, finally resulting in a request from Mr. Richards for the submission to the defendants, Board of Commissioners, of an offer of sale, and in pursuance thereof a letter was sent by the attorneys for the plaintiff, Standard Trap Rock Company, to Mr. Richards under date of October 14, 1927, a copy of which is hereto annexed, made a part hereof and marked Exhibit "E," which contained a description and estimate of the value of the plaintiff, Standard Trap Rock Corporation's, interest in the property.

On October 18, 1927, Messrs. Hughes, Rounds, Schurman & Dwight communicated with Messrs. Appleton, Rice & Perrin by letter stating that the letter of plaintiff, Standard Trap Rock Corporation, dated October 14, 1927, and other data and information had been submitted to defendants, Board of Commissioners of Palisades Interstate Park "who have requested us to report to you that at their meeting today it was decided and resolved by them that their counsel be instructed to take no steps for the condemnation of the Tallman's Mountain property."

On October 19, 1927 Messrs. Appleton, Rice & Perrin wrote Messrs. Hughes, Rounds, Schurman & Dwight acknowledging receipt of their letter of October 18th and stating "our clients are accordingly proceeding with the plans which they had made for the development of the quarry and which have been in abeyance since the receipt of your letter of May 13, 1927."

No further communication, written or oral, was received by either of the plaintiffs from defendants, Board of Commissioners or any department of the State of New York [fol. 57] until August 18, 1928, on which date Bickel Dredging Company, which had been engaged for several weeks in operations at the property, was served with a notice of a resolution of the Board of Commissioners of the Land Office at a meeting held August 16, 1928, requiring the cessation of dredging operations. Deponent is informed, believes and therefore alleges that this action was taken at the request of defendants, Board of Commissioners of Palisades Interstate Park, who had been informed of the plan for dredging eleven months prior and on or before September 20, 1927.

Between October 18, 1927 and October 11, 1928, the date of the notice hereinafter mentioned, plaintiff, Standard Trap Rock Corporation, incurred contractual obligations for the construction and equipment of its plant in the sum of $922,699.85. A schedule marked Exhibit "F" is hereto annexed and made a part hereof, showing the corporations with which such contracts were made, the dates thereof, the general nature of the work to be done and the amount actually paid the contractors, together with other expense incurred.

I am informed that Chapter 602 of the Laws of 1924 provides for the issuance of bonds of the state in an amount not to exceed $15,000,000, the proceeds of which are to be paid into the State Treasury and so much thereof as may be necessarily expended is appropriated for the development, improvement and extension of state parks, including the acquisition of lands for that purpose. Section 3 provides that the proceeds of such bonds, after appropriation or appropriations therefrom by the Legislature, shall be applicable to several purposes; among others, $3,500,000 for the Palisades Interstate Park. Section 4 provides:

"The moneys for the development, improvement and extension of the Palisades Interstate Park shall be expended and the land shall be acquired by the Commissioners of the Palisades Interstate Park under the provisions of Chapter 170 of the Laws of 1900 as amended."

Section 5 provides:

"The moneys appropriated for the acquisition of land under this Act shall be available for the payment of the [fol. 58] purchase price where lands are acquired by contract and for payments of judgments and awards in case of purchase by condemnation."

Section 7 provides:

"The law shall not take effect until after submission to the people at the General Election November 1924" and prescribes the form of ballot, the material portion of which reads:

"Shall Chapter 602 of the Laws of 1924 * * * be approved?"

I am informed that at the General Election of 1924 the question was submitted and received the approval of a majority of all the votes cast for and against the law.

Chapter 16 of the Laws of 1926 is entitled "An Act making appropriation for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and

unified state park system for the promotion of the recreation, instruction and health of the people, to carry out the provisions of Chapter 602 of the Laws of 1924."

Section 1 (2) of this Act appropriated out of moneys realized from the sale of bonds issued under Chapter 602 of the Laws of 1924, $3,500,000 for the Palisades Interstate Park. Section 4 required submission of estimates, maps and descriptions to the State Council of Parks, to the Governor, to the Chairman of the Senate Committee on Finance and to the Chairman of the Assembly Committee on Ways and Means. The memorandum of the action of the Conservation Department, Division of Parks, State Council of Parks, dated September 29, 1928, copy of which is hereto annexed marked Exhibit "G" and made a part hereof, purports to record action under Section 4, Chapter 16 of the Laws of 1926, reappropriated Chapter 75, Part V of the Laws of 1928, which Part V reappropriated and made immediately available for the same purposes as the former appropriations sums described as unexpended bal-
[fol. 59] ances of former appropriations and contains an item entitled "State Park System Fund by Chapter 16 of the Laws of 1926 (re $11,912,850.58)."

Section 602 of the Laws of 1924 provides specifically that the moneys therein provided shall be expended and lands acquired under the provisions of Chapter 170 of the Laws of 1900. Section 16 of the latter Act provided the Commissioners of the Palisades Interstate Park shall not acquire the title to or enter into possession of any premises under condemnation until after an award has either been paid to the owner or the County Clerk and that such payments should operate to transfer the title to the said Commissioners.

Said statute was totally repealed by Chapter 242 of the Laws of 1928, Section 50, and thereafter there was no statute under which moneys realized from the bonds authorized by Chapter 602 of the Laws of 1924 could be expended in the acquisition of land by the Commissioners of the Palisades Interstate Park. Chapter 242 of the Laws of 1928, which creates anew the Commissioners of the Palisades Interstate Park, reenacted the provisions of Chapter 170 of the Laws of 1900 and added thereto Section 761 authorizing acquisition of land by entry and appropriation under

Section 59 of the Conservation Law, a power which did not exist at the time of the passage of the Act making the only existing appropriation for use by defendants, Board of Commissioners of Palisades Interstate Park. I am advised by counsel for plaintiff, Standard Trap Rock Corporation, that no funds resulting from bonds authorized by Chapter 602 of the Laws of 1924 have ever been authorized by the people as required by the Constitution of the State for acquisition by entry and appropriation and that there is therefore no sum available out of said bond issue for that purpose by defendants, Board of Commissioners of Palisades Interstate Park.

On or about October 11, 1928 defendants, Commissioners of the Palisades Interstate Park, assuming to act under Chapter 242 of the Laws of 1928 and other applicable laws of the state of New York, served on plaintiffs a notice that the property described therein, being the property described in the complaint herein, was appropriated by the people of the state of New York for public and state park [fol. 60] purposes with the approval of the Governor, and thereafter entered upon and took possession of said property, of which they have since retained possession to the exclusion of the plaintiffs.

The aforesaid lease covers the entire property of plaintiff, Sparkill Realty Corporation, which has a river frontage in excess of 1,000 feet. It has been estimated by competent engineers that the amount of crushed trap rock which can be economically removed is in excess of 40,000,000 cubic yards. Under the lease plaintiff, Standard Trap Rock Corporation, is obligated to install quarrying machinery having an annual capacity of not less than 500,000 cubic yards and to pay a minmum annual royalty to plaintiff, Sparkill Realty Corporation, of $35,000. at the rate of 7¢ per ~~cubic~~ yard up to 500,000 cubic yards, and for production in excess a royalty at the rate of 6¢ per cubic yard up to and including 600,000 cubic yards, and a royalty at the rate of 5¢ per cubic yard on all quantity over 600,000 cubic yards.

Cost of installation incurred by plaintiff, Standard Trap Rock Corporation, of a quarrying plant by the Allis-Chalmers Company and the Robins Conveying Company, as set forth on Exhibit "F" hereto annexed, including con-

struction of dock and dredging, together with interest and taxes during construction, amounts to $922,699.85.

The property is within 18 miles of the Metropolitan district of the city of New York, which is the largest market for trap rock. The situation of the property is such that during winter months it could be operated at least 5 weeks longer than other quarries situated higher on the river. The short distance from the city of New York enables scows to reach the city on a single tide, where other quarries more distant require two or more tides for the same purpose. The physical nature of the property is such that the open face for the entire frontage reduces the cost of development and makes possible the quarrying of rock from a single bench about nine feet above mean high tide.

Market for trap rock is well assured and deponent from his expericence verily believes and therefore alleges that a net profit of not less than 72¢ per cubic yard can be obtained on an annual output of 750,000 cubic yards, making a total annual profit of $540,000.00.

[fol. 61] Plaintiff, Standard Trap Rock Corporation, but for the unlawful action of defendants, Board of Commissioners, would have placed its plant in operation at a rate of profit as aforesaid not later than the month of November, 1928, and would have been in steady operation since that time by reason of the weather conditions since prevailing. Plaintiff has also been prevented from entering into contracts for the coming year, to its added great loss.

Defendants, Board of Commissioners, may at any time enter upon the destruction and demolition of the plant already installed, the machinery in which is rapidly deteriorating. Liens on the property have been filed by Burrell Engineering & Construction Company, contractors, and plaintiff is therefore subjected to the liability of actions for damages. Unless plaintiff is protected by a temporary injunction it will suffer further irreparable loss.

Plaintiff has issued stock in the sum of about $750,000.00 and has been unable by reason of the facts hereinbefore stated to earn any return upon its property or pay any dividends.

Deponent has stated all the facts to Messrs. Cullen and Dykman, attorneys for plaintiff, Standard Trap Rock Corporation, and is advised by them and therefore alleges that Chapter 242 of the Laws of 1928 and the notice, certificate

and description filed by defendants, Board of Commissioners, thereunder are confiscatory of the property of plaintiffs, unconstitutional and void and respectfully asks this Honorable Court for a temporary restraining order and an interlocutory injunction restraining the defendants and their agents and servants from enforcing said statute, notice, certificate and description against the plaintiff, and from any further continuance of possession of this property.

James G. Shaw.

Sworn to before me this 5th day of March 1929. Augustus J. Wheeler, Notary Public, Nassau County. Cert. filed in Kings Co. Clerk's No. 99. Reg. No. 9317. New York Co. Clerk's No. 853. Reg. No. 9611.

[fol. 62] In United States District Court

[Title omitted]

Affidavit of Ellis C. Soper

United States of America,
Southern District of New York,
State, County, and City of New York, ss:

Ellis C. Soper, being sworn, says:

I graduated from the Armour Institute of Technology, Chicago, Illinois, in 1903, with a degree of Mechanical Engineer. I am a member of the American Society of Civil Engineers, American Society of Mechanical Engineers and American Institute of Mining Engineers.

I have been investigating, designing, constructing and operating Portland cement, crushing, lime and fertilizer plants for the past twenty-five years. Every Portland cement plant, with very few exceptions, must have a well [fol. 63] located, accessible and economical quarry and crushing plant since ordinarily seventy-five per cent. of the material entering Portland cement is hard rock of a certain chemical composition. This experience has covered United States, Mexico, Cuba, Central America, Europe and Canada. During the vacation of 1901, 1902 and 1903, I worked as a Draftsman and Construction Engineer for Newaygo Portland Cement Company, Newaygo, Michigan.

After graduation I was Chief Draftsman and Construction Engineer of the Hecla Portland Cement Company at Bay City, Michigan, and in 1904 I went to Kansas as Engineer and Superintendent of Construction of the Kansas Portland Cement Company of Iola. During this time I was Vice-President of the Hunt Engineering Company, which company was designing and building plants in Kansas and South Dakota. In 1905 I designed and built a plant at Independence, Kansas, and in 1906 and 1907 the plant of the Dixie Portland Cement Company in Tennessee. In 1908 and up to 1911 I was located in Detroit as a Consulting and Construction Engineer and during that time I designed and built what is now the Michigan State Cement Plant near Jackson, Michigan, lime plants in Northern Michigan, Gypsum Plant in Western New York, and rebuilt a cement plant at Wiarton, Canada. From 1912 to 1916 I built two crushing plants in Georgia and an asphalt plant in Chattanooga, and was Construction Engineer on the Market Street Concrete Bridge at Chattanooga which cost $1,000,000. From 1916 to 1917 I designed and built the Cuban Portland Cement Company's plant in Cuba. From 1918 to 1920, I designed and built phosphate rock plants for the Armour Fertilizer Company and operated their Tennessee Chemical Company's plants at Nashville. From 1920 to date my headquarters have been in New York City and during this time I have been engaged in various consulting work, among the companies being the Edison Portland Cement Company and Pennsylvania Portland Cement Company. In my last large work I originated and formed the combination of seven cement plants known as the Pennsylvania and Dixie Cement Corporation of which company I have been a director and Consulting Engineer since its inception in 1926.

[fol. 64] I have visited and inspected the trap rock quarry and stone crushing plant of plaintiff, Standard Trap Rock Corporation, at Piermont, New York, involved in this proceeding. I have been furnished with data showing the cost of construction of the plant and have calculated the cost of operation. I have examined the lease between plaintiff Sparkill Realty Corporation and plaintiff Standard Trap Rock Corporation and am familiar with its provisions. For the purpose of this affidavit, I have adopted the cubical contents of the property as stated in the affidavit of Edward W. Christie in this proceeding.

I am familiar with the cost of labor and material in such a plant and also with the market for crushed stone in the so-called Metropolitan District surrounding the City of New York.

The property is within eighteen miles of the Metropolitan District and is such that it can be operated longer during the year than quarries situated at a greater distance on the Hudson River. My inspection of the property shows an open face for the entire frontage materially reducing the cost of development.

I find the plant constructed by plaintiff, Standard Trap Rock Corporation, to be thoroughly modern in every respect, well adapted for its proposed use and by reason of its nearness to the quarry and general layout I consider it to be one of the best properties of its sort which I have seen in my experience.

Based upon my experience and investigation as stated, I am of opinion that the fair market value of this property as of October 10, 1928, consisting of the quarry and plant, is the sum of $4,000,000, from which amount an allowance of approximately $75,000 should be made for completion of facilities.

Ellis C. Soper.

Sworn to before me this 2nd day of March, 1929. Augustus J. Wheeler, Notary Public, Nassau County. Cert. filed in Kings Co. Clerk's No. 99. Reg. No. 9317. New York Co. Clerk's No. 858. Reg. No. 9611.

[fol. 65] In United States District Court

[Title omitted]

Affidavit of Frank T. Gucker

United States of America,
Southern District of New York,
State, County, and City of New York, ss:

Frank T. Gucker, being duly sworn, says:

I have been engaged in the operation of trap rock quarries and stone crushing plants and sale of their product for

thirty-six years and am president of the John T. Dyer Quarry Company, the main office of which is at Norristown, Pennsylvania. This Company owns and operates three trap rock quarries each equipped with a crushing plant, the [fol. 66] total output being approximately a million tons annually. I have bought and developed quarries and generally engaged in all the activities of this industry.

On October 23, 1928 I visited the property of plaintiff Sparkill Realty Corporation, at Piermont, New York, described in the complaint in this suit. It consists of meadowland and upland in the form of a cliff, the face of which consists of trap rock similar to that quarried and crushed by my Company.

The trap rock in the cliff is exposed to an extent which would obviate stripping such as is usually necessary in the development of a quarry. There exists what is generally known as a natural face. This conformation together with the fact that only one lift or bench would be necessary and the short distance from the quarry face to the primary crusher makes most economical operation possible. Moreover, the grain of the stone and cleavages make most economical drilling and blasting possible so that the combined circumstances are more than ordinarily favorable to economic and efficient operation.

I inspected the plant erected on the property by plaintiff, Standard Trap Rock Corporation, and, from my knowledge of trap rock crushing plants throughout the East, I am able to state that the plant of plaintiff, Standard Trap Rock Corporation, is modern in every respect and well planned and equipped and represents the latest practice and art in the industry.

The plant of plaintiff, Standard Trap Rock Corporation, is fairly comparable in my opinion with one of the plants of my Company, making it possible for me to estimate cost of production in it. From my experience and observation of the property and plant of plaintiff, Standard Trap Rock Corporation, I estimate the cost of rock in bins after the property is developed and the plant is in working order at approximately sixty (60¢) cents per cubic yard, itemized as follows:

[fol. 67] Stripping	$0.01	
Drilling	0.04	
Explosives	0.04	
Secondary drilling and blasting	0.06	
	$0.15	$0.15
Loading	$0.06	
Hauling	0.09	
Crushing and screening	0.25	
	$0.40	0.40
General expense		0.05
Cost of Rock in Bins		$0.60

Frank T. Gucker.

Sworn to before me this 13th day of February, 1929. John Monaghan, Notary Public, Westchester Co. Kings Co. Clerk's No. 7. Kings Co. Register's No. 9105. Commission expires March 30, 1929. (Seal.)

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ARTHUR S. LANE

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

Arthur S. Lane, being duly sworn, says:

I have operated trap rock quarries and stone crushing plants and been engaged in the sale of trap rock since April 1st, 1891 and am treasurer of John S. Lane & Son, Inc. John S. Lane & Son, Inc. is the successor of a partnership formed by my father in 1891. Its principal office is located at Meriden, Connecticut, and it owns and operates five

[fol. 69] quarries and plants situated at Westfield, Massachusetts, West Springfield and Amherst, Massachusetts, with an annual output of approximately 750,000 tons of trap rock.

I personally bought and developed all the trap rock quarries now operated by my Company. From 1893 to 1898 John S. Lane & Son, a partnership, operated a trap rock quarry at Guttenberg, New Jersey on the Hudson River at the lower end of the Palisades formation and I am familiar with the formation and character of rock along the western bank of the Hudson River from Piermont to Guttenberg.

From 1902 to 1926 I was treasurer of The Connecticut Quarries Company, operating four to six trap rock quarries and stone crushing plants with an average annual output of approximately 800,000 tons per annum.

On November 1, 1928 I visited the property of plaintiff, Sparkill Realty Corporation, at Piermont, New York, described in the complaint in this suit. The upland portion of this property consists of a cliff, the face of which is trap rock similar to that quarried and crushed by my Company at Guttenberg, New Jersey.

The rock in the cliff is exposed, enabling me to state from my experience that the whole formation is trap rock above mean high water. The fact of such exposure makes it unnecessary to strip the cliff to any extent, such as is usually necessary in the development of a quarry. This property can be developed and operated as a quarry with one lift or bench. The distance from the quarry face to the primary crusher is short. These circumstances render economic and efficient operation possible.

I inspected the plant erected on the property, going through it in detail and believe it to be the best stone crushing plant I have ever seen.

I have examined a copy of the lease attached to the complaint in this suit and marked Exhibit A to ascertain the amount of royalty payable to the landlord.

From my experience and investigation I estimate the cost of rock in bins at approximately sixty-four and three-quarter (64¾¢) cents per cubic yard, itemized as follows:

[fol. 70] Royalty	$ .0638
Stripping	.0100
Upkeep and operation of trucks	.0390
Electrical current	.0893
Upkeep of shovels	.0116
Labor except truck drivers	.2647
Fuel oil	.0003
Lubricating oil	.0040
Explosives	.0678
General repairs	.0438
Superintendence	.0100
Miscellaneous expenses	.0468
	$ .6511

Arthur S. Lane.

Sworn to before me this 13th day of February, 1929. Frederick A. Delatour, Notary Public, 120, Kings Co. N. Y. Cert. filed N. Y. Co. 692.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM E. KEINE

UNITED STATES OF AMERICA,
Southern District of New York,
State, County and City of New York, ss:

William E. Keine, being sworn, says:

I am and at all times herein mentioned have been in charge of the sales engineering in the Crushing and Cement Machinery Division of Allis-Chalmers Manufacturing Company in New York, Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Pennsylvania, West Virginia, Virginia, Maryland, Delaware and certain sections of the Caro-[fol. 72] linas, in other words, the Atlantic Seaboard. As such I have supervision of the preparation of plans, specifications, cost estimates and contracts for the construction of stone crushing and cement plants throughout the ter-

ritory mentioned. I have been employed by Allis-Chambers Manufacturing Company for the last twenty-four years in various capacities in the crushing and cement machinery department. The corporation does a business in this department of several million dollars a year.

Early in the spring of 1927 I visited the property of plaintiff Sparkill Realty Corporation at Piermont with Mr. Anderson Dana and others, and thereafter prepared plans, specifications and estimates which finally resulted in contracts between plaintiff Standard Trap Rock Corporation and Allis-Chalmers Manufacturing Company dated January 31, 1928, February 15, 1928 and May 5, 1928, providing for the preparation of plans and furnishing of machinery specially designed to suit the particular conditions existing at this location.

Thereafter all the machinery called for by the contracts was completed and to a large extent actually installed in the plant.

During the course of construction I visited the plant frequently and am familiar with it. In my opinion, based on my experience, I estimate the cost to plaintiff Standard Trap Rock Corporation of the buildings and machinery installed including quarry equipment, to be somewhat in excess of One million Dollars.

W. E. Keine.

Sworn to before me this 7th day of February, 1929.
Frederick A. Delatour, Notary Public, 120, Kings Co. N. Y.

[fol. 73] In United States District Court

[Title omitted]

Affidavit of Edward W. Christie

United States of America,
Southern District of New York,
State, County, and City of New York, ss:

Edward W. Christie, being sworn, says:

I am a Civil Engineer and Surveyor, licensed by the State of New York. I have resided and maintained an office at Nyack, New York since nineteen hundred and two and have

been in active practice of my profession since eighteen hundred and ninety-eight.

I have been familiar with the property described in Exhibit A attached to the complaint in this suit for twenty years. It consists of meadowland and upland in the form of a cliff, the average height of which is one hundred and fifty (150) feet above mean high water. The face of the cliff consists of rock commonly known as trap rock.

In 1927 I surveyed the property as described in Exhibit A and prepared a map from said description and my survey. Thereafter I personally determined mean high water at the property and made a topographical survey determining the elevations of the property from mean high water. From said topographical survey I have calculated the cubical contents of the property to be 468,024,802 cubic feet or 17,334,252 cubic yards.

[fol. 74] This calculation does not include three parcels detached from the area included in the foregoing calculation and lying to the south thereof and included in the description attached to Exhibit A, of which I have not had an opportunity to make a topographical survey.

Edward W. Christie.

Sworn to before me this 13th day of February, 1929. John Monaghan, Notary Public, Westchester County. Kings Co. Clerk's No. 7. Kings Co. Register's No. 9105. Commission expires March 30, 1929. (Seal.)

[fols. 75 & 76] In United States District Court

[Title omitted]

Affidavit of Jackson A. Dykman

United States of America,
State of New York,
County of Kings, ss:

Jackson A. Dykman, being sworn, says: I am a member of the firm of Cullen & Dykman, solicitors for plaintiff Standard Trap Rock Corporation in this suit. Subse-

quent to the argument herein and on the day of the date of this affidavit I obtained from the office of the Comptroller [fol. 77] of the State of New York a certified copy of plaintiffs' Exhibit G, attached hereto.

The copy hereto attached shows that the original approval of the Conservation Department, Division of Parks, State Council of Parks, was signed and filed with the State Comptroller October 8, 1928 and that the approval of the Committee on Park Estimates and Maps, consisting of the Governor, the Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee, was signed and filed with the Comptroller on the same day.

Jackson A. Dykman.

Sworn to before me this 15th day of April, 1929. John Monaghan, Notary Public, Westchester County. Kings Co. Clerk's No. 76. Kings Co. Register's No. 1342. Commission expires March 30, 1931. (Seal.)

[fol. 78] Conservation Department, Division of Parks, State Council of Parks, Acting under the Provisions of Section 4, Chapter 16, of the Laws of 1926; Reappropriated Chapter 75, Part 5, of the Laws of 1928.

Pursuant to the provisions of Section 4 of Chapter 16 of the Laws of 1926, reappropriated Chapter 75, Part 5 of the Laws of 1928, the State Council of Parks, Division of Parks, Conservation Department, at a regular meeting held at Watkins Glen State Park, Schuyler County, New York, Saturday, September 29, 1928, approved estimates and maps covering the following project for Acquisition of Land, which project was also duly submitted to the Governor, the Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee and received their approval.

Conservation Department, Division of Parks, State Council of Parks, (Signed) by Robert Moses, Chairman. Henry F. Lutz, Secretary. (Seal Department of Conservation, State of New York, State Council of Parks, 1924.)

Dated Sept. 29/28.

Original approval, signed, and filed with the State Comptroller October 8, 1928. —— ——, the Director of the Budget.

[fol. 79] Committee on Approval of Park Estimates and Maps, Consisting of the Governor, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee, Acting under the Provisions of Section 4, Chapter 16, of the Laws of 1926; Reappropriated Chapter 75, Part 5, of the Laws of 1928

Pursuant to the provisions of Section 4 of Chapter 16 of the Laws of 1926, reappropriated Chapter 75, Part 5 of the Laws of 1928, we, the undersigned, do hereby approve the following park project for Acquisition of Land which, together with maps and estimates, has been submitted by the State Council of Parks, Division of Parks, Conservation Department.

II

Project 3, Land Acquisition, Palisade Interstate Park

Acquisition of any or all lands (including lands under water) within the jurisdiction of the Commission, as defined by Chapter 242, Laws of 1928, in the towns of Clarkstown and Orangetown, County of Rockland, State of New York, as shown on key map which is attached, $600,000.

(Signed) Alfred E. Smith, Governor. C. J. Hewitt, Chairman of the Senate Finance Committee. [fol. 80] Eberly Hutchinson, Chairman of the Assembly Ways and Means Committee.

Original approval signed and filed with the State Comptroller October 8, 1928. (Signed) J. H. Wilson, the Director of the Budget.

This allocation approved without being referred to the division of the budget.

Bureau of Canal Affairs, Albany

April 12, 1929.

State of New York, ss:

Comptroller's Office

I have compared the annexed copy of allocation of moneys appropriated by Chapter 16, Laws 1926 with the

original on file in this office, and do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year first above written.

C. H. Mullins, Assistant Deputy Comptroller. (Seal.)

[fols. 81 & 82] In United States District Court

[Title omitted]

Affidavit of J. Du Pratt White

United States of America,
Southern District of New York,
State, County, and City of New York, ss:

J. Du Pratt White, being duly sworn, says:

I reside at upper Nyack, New York. *For up*torney of the courts of New York, and for upwards of twenty-nine years of this court. I am the President of the Commissioners of the Palisades Interstate Park, a body politic [fol. 83] created by the laws of State of New York (L., 1900, Ch. 170) and continued, after intermediate amendments, by the Conservation Law (L., 1928, Ch. 242).

On October 11, 1928, the Commissioners of the Palisades Interstate Park, with approval of the Governor and the Conservation Commissioner, took the property at Tallman Mountain, near Piermont, Rockland County, New York (described in Ex. 1, hereto annexed and made a part hereof), in eminent domain proceedings pursuant to the Conservation Law and on that day, according to the express provisions of that law, title to the property became vested in the People of the State of New York. During the five months intervening between the taking of the property and the commencement of this action, the State through the Commissioners of the Palisades Interstate Park, has been in undisturbed and exclusive possession of this property to the knowledge of the plaintiffs herein.

I am advised by counsel for the Commission that as a matter of law no basis is shown for the relief demanded in the bill of complaint or in the affidavits. Though the questions involved are almost wholly questions of law, certain facts as to the background of this litigation should be presented to the Court.

Creation and Organization of the Commissioners of Palisades Interstate Park

Prior to 1900, the States of New York and New Jersey appointed commissions which agreed jointly upon a report to their respective states as to the "means and extent of defacement of Palisades" and as to "means by [fol. 84] which further destruction and defacement may be prevented."

In 1900, the State of New York (L., 1900, Ch. 170) incorporated the "Commissioners of the Palisades Interstate Park" a body politic of ten commissioners, five of whom were not required to be citizens or residents of New York. In the same year, the State of New Jersey (L., 1900, Ch. 87), incorporated the "Commissioners of the Palisades Interstate Park" a body politic of ten commissioners, five of whom were not required to be citizens or residents of the State of New Jersey. The legislation contemplated that the five residents of New Jersey should be appointed members of the New York Commission and vice versa. The purpose of the acts is stated in the report of the New York Commission for the year 1901, as follows:

"By the intention of the two statutes thus indicated, the personnel of the New York Commission is made the same as that of the New Jersey Commission, the Commissioners working in unison in their capacities as representatives of the respective States for the accomplishment of the one object."

Since that time, with a slight and temporary exception, the two States have always appointed the same persons as commissioners for the respective commissions. (Unless the New Jersey Commission is specifically designated, all references herein are to the New York Commission).

The jurisdiction of the two commissions was originally from Fort Lee, New Jersey, on the south, to Piermont

Creek, New York, on the north. The northern boundary [fol. 85] was later extended to embrace the mountainous lands along the west bank of the Hudson River south of Stony Point and still later to the City of Newburgh. The New York park is in several sections; the Palisades section, which runs from the state line to Piermont Creek; and includes the property described in Exhibit 1; the Blauvelt Section; the Rockland Lake—Hook Mountain section; the Harriman Park—Bear Mountain Section, and the Storm King section.

I am thoroughly acquainted with the history and activities of the Commissions. I have been a member of both commissions since their inception; I was secretary of both until 1921, and in that year became president of the New York commission, filling the vacancy created by the death of the former president, the late Mr. George W. Perkins.

At the time of the appropriation of the property described in the appropriation papers, the members of the two commissions were:

Residents of New York: J. DuPratt White, Edward L. Partridge, George W. Perkins, Jr., W. Averell Harriman, Frederick Osborn.

Residents of New Jersey: Frederick C. Sutro, Franklin W. Hopkins, George T. Smith, William Childs, Charles W. Baker.

[fol. 86] The Policy of the Commissions with Respect to the Prevention of Quarrying

From their inception, the commissions deemed that they were under a mandate from the two states to prevent, so far as lay within their power and jurisdiction, the defacement of the slopes along the west bank of the Hudson River by quarrying.

Pursuant to this mandate, at least six quarries, all of them situated on the Hudson River, had before 1921 been closed by purchase or by condemnation, by one or the other commission. (As an officer and a member of both commissions I was in close touch with the purchases and condemnations of all of these quarries). Included in these were quarries which,—(unlike the one here that was never completed or operating),—were at the time of their acquisition going concerns that had been in operation for years and were earning large profits.

The policy was so well known to the public that in 1924-1925, before a particular company attempted to open a quarry, it discussed its plans with representatives of the Commissions and assured them that the quarry would be so conducted behind the mountain as not to deface the slopes fronting the Hudson.

From 1921, when the last of the quarries acquired ceased operating, until plaintiffs started to develop a quarry at Tallman Mountain, all quarrying operations that were, in the judgment of the Commissions, defacing the Palisades or the slopes on the west shore of the Hudson within the jurisdiction of the Commissions, had ceased, and so far as the Commissions knew, no new quarrying operation was threatened or contemplated.

[fol. 87] Through the funds appropriated by the State, the munificent private gifts of money and property to the Commissions, and the assistance and support of property owners and the public, the scenic beauty of the section committed to the charge of the Commissions has been preserved and the lands acquired have been converted into great public parks which now serve the recreational needs of millions of persons annually.

The Events Leading Up to the Acquisition of the Tallman Mountain Property by Eminent Domain

The property appropriated is situated at Tallman Mountain, near Piermont, Rockland County, New York. It consists, I am informed and believe, of approximately 113½ acres of upland and 57½ acres of marshland. A description of the property is contained in the appropriation papers hereto annexed, marked Exhibit 1 and made a part hereof.

In the spring of 1927, the New York Commission was informed that quarry operations were contemplated at Tallman Mountain. It thereupon, on May 7, 1927, passed a resolution that all preliminary steps be taken looking to condemnation and that counsel for the Commission so notify the owners and ask them whether they wished to consider private negotiations for a sale of the property. This was done and throughout the spring and summer of 1927, there were conferences between Mr. Richards of Hughes, Rounds, Schurman & Dwight (attorneys for the Commission), and the attorneys for the plaintiffs. On

October 14, 1927, the fee owners (see Exhibit E, attached to the moving papers) wrote the Commission, placing a valua-
[fol. 88] tion of $3,000,000 on the fee. On the same day, Messrs. Appleton, Rice & Perrin (attorneys for the Standard Trap Rock Corporation), wrote the attorneys for the Commission, placing a valuation on the leasehold interest of not less than $5,000,000,—making a total valuation of $8,000,000. (Mr. Shaw in his affidavit, page 50, mistakenly states that he attaches as Exhibit E, the letter sent by the attorneys for the Standard Trap Rock Corporation. In fact, Exhibit E is the letter of Mr. Hemmens, the attorney for the Sparkkill Realty Corporation. The letter written the same day by Messrs. Appleton, Rice & Perrin, on behalf of the Standard Trap Rock Company, is not attached by Mr. Shaw.)

At that time, I am informed and believe, the property was wholly unimproved, and the assessed valuation thereof for tax purposes was about $15,000,—less than one-fifth of 1% of the valuation placed thereon by the fee owner and the lessee. In the opinion of the Commission the valuations of the owners and lessee were excessive.

In the course of negotiations, Mr. Richards reported to the Commission that the lessee's attorneys had argued that the land in question was not technically a part of the Palisades and was therefore not within the condemning jurisdiction of the Commission. Thereupon, the Commission asked for an opinion from its counsel and was advised that there was some doubt as to whether the property in question lay within the then condemning jurisdiction of the Commission, but that there was no doubt of the Commission's power to purchase.

In these circumstances, the Commission instructed its counsel to take no steps for the condemnation of the prop-
[fol. 89] erty and to notify the owners accordingly. I attach hereto, as Exhibits 2 and 3, copies of the letters which Mr. Richards sent to the respective parties.

On October 19, 1927, after the receipt of Exhibit 2, one of the attorneys for the lessee, telephoned Mr. Richards and asked for some amplification of the letter. Mr. Richards replied that he could add nothing to what was stated in the letter and that he could not predict what the Commission's future attitude would be.

At the next session of the New York Legislature, the law relating to the Commission was amended in two respects material here: the Legislature made unmistakably clear that the eminent domain jurisdiction of the Commission included the property in question and it expressly empowered the Commission, in its compulsory acquisitions, to proceed by way of entry and appropriation proceedings (L., 1928, Ch. 242 [amending Conservation Law], Secs. 747, 761).

(I am informed and believe that the Conservation Department and its predecessors have uniformly employed the appropriation process for the acquisition of lands by eminent domain for state purposes, to the virtual or complete exclusion of the alternative method of condemnation; the total acquisitions by the State through appropriations and entry proceedings having run, as I understand, since the enactment of the Adirondacks Park Act a generation ago, to many thousands of acres.)

The Appropriation of the Property

After the passage of Chapter 242 of the Laws of 1928, amending and enlarging the Conservation Law, the Com- [fol. 90] mission learned that work was being done upon the property in question, looking to the operation and equipment of a quarry there.

Before the appropriation of the property the Commission renewed its efforts to arrive at some understanding with the lessor and the fee owner, and conversations were had between counsel for the Commission and for the lessee. During all of this time construction work upon the property was proceeding. Finally, the representatives of the fee owner and of the lessee submitted offers. These figures were less than half the prices placed upon the property by the respective parties a year earlier.

The Commission at a meeting on October 9, 1928, decided that these prices were likewise excessive, and that, under the circumstances, further negotiations for the purchase of the property would be fruitless. At the same meeting, the resolution to appropriate was passed. On October 10th, the action of the Commission was approved in writing by the Conservation Commissioner and by Gov. Alfred E. Smith. On October 11th, the appropriation papers were filed in the office of the Secretary of State and on that day they were

served upon the Sparkill Realty Corporation and the Standard Trap Rock Corporation, together with the notice that the lands were appropriated. Thereafter, the papers were filed and recorded in the office of the Clerk of Rockland County.

On October 16, 1928, the Commission's attorneys notified Messrs. Appleton, Rice & Perrin, the attorneys for the lessee, that the personal property on the premises was there at the risk of the lessee. A copy of counsel's letter is attached as Exhibit 4.

[fol. 91] I am informed and believe that immediately after the appropriation papers were served, plaintiffs ceased doing any work on the property; that the contractors and other persons who were engaged in doing work thereon left, taking their machinery and tools with them and that certain movable property and equipment that had been used or was there for use in connection therewith, was likewise removed from the premises.

The State through the Commission has been in exclusive possession of the property as a State park since October 11, 1928, the date when the appropriation became complete by service upon plaintiffs of the appropriation papers. At that time the Commission took over as its agents, the watchmen Hughes and Sheehan, who had been employed by the Standard Trap Rock Corporation. These men were transferred to the Commission's employ and remained therein from October 12th to November 15th. On December 15, 1928, the Commission paid the Standard Trap Rock Corporation $350 to reimburse it for the salaries of these men. From November 15th on, patrolmen from the regular police force of the Commission have been assigned to duty as watchmen on the premises.

I have been in active touch with the Tallman Mountain situation, except between Sept. 21 and Nov. 2, 1928, when I was abroad. I knew the premises well, and had visited them from time to time, saw them shortly before I went abroad and almost immediately after my return. (My statements covering the period of my absence are based upon information obtained from members of the Commission, their attorneys and agents, and from the records of the Commission.)

[fol. 92] I have been advised by our counsel and believe that the value of the property is, as such, not an issue in

this litigation,—that the value is to be fixed in the only court in which the State has consented to have a binding adjudication against it—the Court of Claims. In the circumstances, the Commission—though it denies plaintiffs' estimates of value and in the Court of Claims will challenge the figures now presented on behalf of the plaintiffs—will confine itself to stating the conclusion it reached at the time it appropriated.

All of the members of the Commission were familiar with the property and had visited it at one time or another; many of them had visited it shortly before the appropriation; I have been familiar with the property for forty years and had gone over it on many occasions, some of them just before the appropriation. The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property was worth less than $600,000, and that the obligation of the State would not exceed that sum. The Commission thereupon sought and obtained an allocation from the bond issue moneys of $600,000 (see Exhibit G attached to the plaintiffs' moving papers).

I am advised,—and it will be so demonstrated by the argument and briefs of counsel,—that the allocation does not purport to limit, and as a matter of law, could not limit the obligation of the State in any way; that the obligation of the State within the express provisions of the Conserva-
[fol. 93] tion Law, is explicit, absolute and unlimited in amount; and that whatever values the owners may establish in the Court of Claims, the obligation of the State to pay the amount awarded would be unaffected by the circumstance that there had been an allocation in a lesser amount. (As has been judicially noted in a closely related litigation there has never been a case in the whole history of the State where a judgment of the Court of Claims or of its predecessors has been left unpaid.)

The State has taken here only real property. The State has never claimed, nor has the Commission ever exercised, any dominion over the personal property on the premises. On the contrary, the Commission's position in this matter

is as shown in the letter of its counsel to the attorneys for the lessee, Exhibit 4, hereto attached.

J. Du Pratt White.

Sworn to before me this 1st day of April, 1929. J. F. Plaisted, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 624. Reg. No. 0-17-A. Commission expires March 30th, 1930.

[fol. 94] EXHIBIT 1 TO AFFIDAVIT OF WHITE

Appropriation Papers

Certified Copy of Resolution

Commissioners of the Palisades Interstate Park

Extract from Minutes of Meeting Held October 9, 1928

Whereas, it is necessary that the land herein described be acquired for the purposes of a public and State park, it is therefore

Resolved, that pursuant to the provisions of Chapter 242 of the laws of 1928 and the other applicable provisions of the laws of the State of New York, the Commissioners of the Palisades Interstate Park enters upon, takes possession of and appropriates, in the name of the People of the State of New York,

All those certain pieces or parcels of land, situate, lying and being at Piermont, in the town of Orangetown, County of Rockland and State of New York, bounded and described as follows:

First Parcel: Beginning at a stake on the south bank of Sparkill Creek said point of beginning being the northwest corner of a plot of 2.87 acres of land formerly owned by Peter H. and Charles Taulman; thence running north 86 degrees 53 minutes east 37.7 feet to the north side of Ferdon Avenue; thence along the north side of Ferdon Avenue, north 66 degrees .08 minutes east 106.7 feet to the west side [fol. 95] of the Road running to Nyack; thence crossing the said Road running to Nyack, north 81 degrees 54 minutes east 110.4 feet; thence north 61 degrees 13 minutes east

129.6 feet to a stake; thence south 24 degrees 09 minutes east 112 feet to a point on the north side of the old Brewery Roadway; thence north 77 degrees 0 minutes east 236.8 feet; thence south 77 degrees 0 minutes east 66 feet; thence south 49 degrees 15 minutes east 66 feet; thence south 26 degrees 0 minutes east 66 feet; thence south 4 degrees 45 minutes east 135.3 feet; thence south 8 degrees 30 minutes east 79.86 feet; thence south 0 degrees 30 minutes west 119.46 feet; thence south 4 degrees 0 minutes east 386 feet; thence south 85 degrees 45 minutes west 52.8 feet; thence south 16 degrees 05 minutes west 304.26 feet; thence south 14 degrees 35 minutes west 382.8 feet; thence south 16 degrees 25 minutes east 138.6 feet; thence south 19 degrees 50 minutes west 130.02 feet; thence south 13 degrees 25 minutes east 102.9 feet; thence south 10 degrees 37 minutes east 233.7 feet; thence south 25 degrees 50 minutes east 436.6 feet; thence south 12 degrees 05 minutes east 420.8 feet; thence south 9 degrees 54 minutes east 204 feet; thence south 14 degrees 58 minutes east 209.2 feet; thence south 14 degrees 59 minutes east 148.7 feet to a cedar stump; thence south 13 degrees 56 minutes east 157.9 feet; thence south 4 degrees 34 minutes east 82.1 feet; thence south 14 degrees 25 minutes east 1,041 feet to a stone monument and the lands of the Standard Oil Company; thence along the lands of the Standard Oil Company, south 73 degrees 30 minutes west 308 feet; thence continuing along said lands, [fol. 96] north 20 degrees 25 minutes west 365.2 feet to a stake and the lands of the Rockland Country Club; thence running along the lands of the Rockland Country Club; north 15 degrees 21 minutes west 194.3 feet to a stone wall; thence along said lands and stone wall, the following courses and distances; north 25 degrees 41 minutes west 131.5 feet; north 17 degrees 11 minutes west 113.9 feet to an iron bolt; north 13 degrees 08 minutes west 326.5 feet to an iron bolt; thence still along said lands, south 82 degrees 28 minutes west 130.6 feet to an iron bolt; south 83 degrees 42 minutes west 126.2 feet to an iron bolt and a stone wall; thence still along said lands and stone wall, south 84 degrees 51 minutes west 240 feet to an iron bolt; south 84 degrees 11 minutes west 317.9 feet to the end of said wall; thence still along said lands, south 84 degrees 23 minutes west 155.4 feet to the

lands now or formerly owned by Swan; thence along the lands now or formerly of Swan, north 6 degrees 40 minutes west 336 feet to the lands now or formerly owned by Chadwick; thence along the lands now or formerly of Chadwick, the following courses and distances; north 84 degrees 59 minutes east 104.3 feet; north 82 degrees 36 minutes east 158.4 feet; north 84 degrees 23 minutes east 356.6 feet; north 83 degrees 58 minutes east 300 feet to a stake and stones; north 82 degrees 55 minutes east 377.5 feet to a stake and stones; north 29 degrees 31 minutes west 191.6 feet; north 28 degrees 14 minutes west 213.5 feet; north 36 degrees 45 minutes west 118 feet; north 26 degrees 13 minutes west [fol. 97] 252.9 feet to an iron bolt; south 55 degrees 24 minutes west 128.8 feet; south 74 degrees 12 minutes west 17.8 feet; south 33 degrees 26 minutes east 99 feet to an iron bolt; south 56 degrees 04 minutes west 788.6 feet to an iron bolt; north 21 degrees 26 minutes west 38.9 feet; north 25 degrees 26 minutes west 283.8 feet to a stake in a small brook, thence still along said lands and a stone wall, south 82 degrees 34 minutes west 111 feet; south 82 degrees 12 minutes west 262.4 feet; south 82 degrees 34 minutes west 274.3 feet; south 83 degrees 13 minutes west 166.4 feet; south 83 degrees 02 minutes west 357.8 feet to an iron bolt on the east side of the Public Road leading to Piermont; thence along the easterly side of said Road, north 20 degrees 41 minutes east 126 feet; north 11 degrees 39 minutes east 190.8 feet; north 3 degrees 29 minutes west 116.5 feet; north 11 degrees 47 minutes west 52.4 feet to the south line of a Reserved lot; thence along the south side of said Reserved lot, north 77 degrees 21 minutes east 193.6 feet; thence north 11 degrees 03 minutes west 46.2 feet to a stone wall; thence along said stone wall, south 77 degrees 21 minutes west 193.8 feet to the east line of said Public Road; thence running along a stone wall and the east line of said Public Road, north 13 degrees 15 minutes west 356.4 feet to the lands now or formerly of Folk; thence running along a stone wall and the lands now or formerly of Folk, the following courses and distances; north 71 degrees 41 minutes east 1,075.6 feet; north 21 degrees 19 minutes west 85.8 feet; north 29 degrees 49 minutes west 82.3 feet to a stone wall; north 28 degrees 15 minutes west 206.3 feet to the [fol. 98] lands now or formerly of Mouquin; thence along

a stone wall and lands now or formerly of Mouquin, north 39 degrees 01 minute east 112.6 feet; north 42 degrees 01 minute east 200.4 feet to another stone wall; thence still along said lands and stone wall, the following courses and distances: north 38 degrees 42 minutes west 21.3 feet; north 36 degrees 56 minutes west 125.3 feet; north 38 degrees 36 minutes west 204.4 feet; north 37 degrees 44 minutes west 125.5 feet to a point in the Public Road leading from the Palisades to Piermont; thence thru the said Road, north 43 degrees 10 minutes east 103.8 feet to a wall in line of lands now or formerly of Lawrence; thence along lands of said Lawrence, south 42 degrees 34 minutes east 55 feet; north 55 degrees 06 minutes east 96 feet; north 44 degrees 57 minutes east 96.8 feet to a stone wall; thence south 47 degrees 09 minutes east 146.9 feet to an iron bolt; thence north 46 degrees 36 minutes east 793.2 feet to a stake; thence north 42 degrees 24 minutes west along lands now or formerly of Jules Mounier, and crossing Ferdon Avenue a distance of 440 feet to the point or place of beginning.
[fol. 99] The said courses, distances, dimensions and boundaries being according to a survey made by E. W. Christie, of Nyack, N. Y. on April 7, 1928.

Second Parcel: The following Salt Meadow lots shown in the Tappan section of the Orangetown Salt Meadow map, made by James S. and James S. Haring, Jr., Surveyors, in October, 1877, a copy of which map is filed in the Town Clerk's office in the town of Orangetown and in the office of [fol. 99] the County Clerk of Rockland County, and also in the Comptroller's office of the State of New York, at Albany, as follows:

A, 1 2, 5, 6, 7, 8, 16, 17, 18, 21, 22, 22A, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 45, 47 and 57.

Some of the said lots being more particularly described as follows:

(a) A lot of Salt meadow, beginning at a stake standing at the ditch near the foot of the hill, at the northwest corner of a salt meadow lot formerly of Gerrit Smith; thence running north 4¼ degrees east 3 chains and 6 links to the end of a small creek called crooked creek; thence along said Creek, southeasterly and southwesterly to a stake in said Creek; thence southwesterly along said Creek to a

stake in said Smith's line; thence north 85 degrees west 5 chains and 85 links to the place of beginning. Containing 1½ acres, more or less bounded north and east by said crooked creek; south by Gerrit Smith and west by the ditch at the foot of the hill.

(b) A lot of salt meadow, beginning at a point at the northwest corner of said lot at a ditch, and runs from thence southerly along the same to a stake and land now or late of Morris Bartow; thence easterly along the land of said Bartow to a stake and land now or late of Jacob Fer-
[fol. 100] don; thence northerly along the land of said Ferdon to the Crum Kill Creek; continuing northerly along said Creek to land now or late of William A. Mabie; thence along the land of said Mabie, to the place of beginning. Containing 2½ acres of land, more or less.

(c) Salt meadow lot known as the mud bend, beginning at a stake near the little Krum Kill, on the line of Dr. Morris Bartow; thence running westerly to the ditch near the mountain; thence along said ditch to a stake on the line of the heirs of Samuel Sneden; thence easterly along said line to the aforesaid Kill; thence along said Kill to the place of beginning. Containing 1 acre more or less, bounded on the north by Dr. Morris Bartow; on the west by the aforesaid ditch; on the south by the land of the heirs of Samuel Sneden, and on the east by the said Krum Kill.

(d) All that certain lot of salt meadow land, situate and being at Piermont, in Orangetown at the Slote Creek; thence south 25½ degrees east 1 chain and 86 links to the salt meadow road; thence north 69 degrees east 3 chains and 45 links; thence north 82¼ degrees east 1 chain; thence south 55 degrees east 1 chain; thence south 36 degrees east 28 links to a ditch; thence north 57 degrees east 2 chains and 58 links to the Slote Creek; thence north 13½ degrees west 2 chains 68 links; thence north 23 degrees west 2 chains; thence north 53 degrees west 60 links; thence south
[fol. 101] 80 degrees west 2 chains and 46 links; thence south 59 degrees west 52 links; thence south 32 degrees west 1 chain and 37 links; thence south 24 degrees west 88 links; thence south 37 degrees west 1 chain and 67 links; thence south 49½ degrees west 1 chain and 93 links to the

place of beginning. Containing 3 acres and 28 hundredths of an acre.

(e) All that certain lot of salt meadow, situate, lying and being at Piermont in Orangetown, County of Rockland and State of New York, bounded and described as follows: Beginning at the ditch by the salt meadow road; thence south 23 degrees east 1 chain and 54 links; thence south 18 degrees east 1 chain and 94 links; thence north 84 degrees east 4 chains and 80 links to a ditch; thence north 10 degrees west 5 chains and 35 links to the Slote Creek; thence south 39 degrees west 1 chain and 59 links; thence south 64¾ degrees west 63 links; thence north 89 degrees west 62 links; thence north 64¾ degrees west 63 links; thence north 89 degrees west 62 links; thence north 64½ degrees west 77 links to a ditch; thence south 57 degrees west 2 chains and 54 links to the place of beginning. Containing 2 acres be the same more or less.

(f) A piece of salt meadow in Orangetown bounded north by heirs of Peter Tallman, dec. easterly by a ditch, southerly by land of Garret Onderdonk, westerly by a road leading around the mountain. Containing 1 acre more or less.

[fol. 102] (g) All that certain lot of salt meadow land, situate, lying and being in the Town of Orangetown, County and State aforesaid, on the east side of the mountain known as Taulman's mountain, bounded and described as follows, viz.: On the west by a ditch adjoining the salt meadow road; south by the Crum Kill; east by meadow lot of James C. Smith, and north by meadow now or late of Tunis A. Smith. Containing 1 acre and ¾ of an acre, more or less.

(h) Salt meadow lot, beginning at southeast corner of said lot at west side of Slote Creek and northeast corner of a lot formerly of Barney N. Huyler now Ferdinand Roth; thence south 85 degrees 15 minutes west 234 feet along said Roth land to a ditch; thence along same north about 150 feet to said Slote Creek; thence along same down stream northwardly, easterly and southerly to Beginning. Containing 1.97 acres more or less. Being the most northerly point or bend in the Tappan salt meadow and lying directly opposite the late residence of Abram Auryansen, deceased.

(i) Salt meadow lot, beginning at a stake standing at the northeast corner of said lot salt meadow on the south side of old Crume Kill being northwest corner of a lot of salt meadow of Eleazor Lord; thence along meadow of said Eleazor Lord about south 29 degrees east about 6 chains 26 links to a stake and meadow formerly owned by [fol. 103] Isaac I. Blauvelt; thence along same about south 54¼ degrees west 1 chain 73 links to a stake and meadow of Tunis Haring; thence along same about North 29 degrees west 6 chains about 50 links to said Crume Kill; thence along said Crume Kill northeast to Beginning. Bounded East by salt meadow of said Eleazor Lord; south by meadow formerly of said Isaac T. Blauvelt; west by meadow of said Tunis Haring; northwest by the Crume Kill. Containing 1.09 acres more or less.

(j) Salt meadow lot, bounded west end 2 chains 38 links by salt meadow of Catherine Onderdonk; South by salt meadow ground of Cornelius J. Smith 7 chains 35 links; east by salt meadow of Dunlap 2 chains 43 links; north by salt meadow of Eleazor Lord 7 chains 87 links; containing 1¾ acres more or less.

(k) Tappan meadow, bounded north by Garret H. Banta, dec. (lot 32) East by Gilbert D. Blauvelt, dec. (lot 36) South by Nancy Vervalen (lot 38) West by Charles B. Wood (lot 31). Being same conveyed by Ellen Decker, Jane Ryerson, Ann Wandle, Francis J. Maxwald, W. H. Wandle, Blanche Wandle and Lizzie A. Wandle, to Elisha Ruckman by deed dated November 9, 1871, containing 1.80 A.

(l) Tappan meadows, bounded North by John W. Ferdon, dec. (lot 39) East by Hudson River; south by John W. Ferdon, dec. (lot 47) West by Francis Bolting (lot 41), [fol. 104] containing 1.04 acres, being or intended to be the same conveyed by Jacob M. Bogert and wife to Elisha Ruckman by deed dated April 29, 1871.

(m) Salt meadow lot, commencing at southeast corner of lot being the southwest corner *of lot being the southwest corner* of land of Berard at a stake; thence north 32 degrees west 1 chain 25 links to a stake; thence south 56 degrees west 8 chains 72 links to bend of ditch; thence along the ditch south 32 degrees east 1 chain 25 links to ditch; thence

north 56 degrees east 8 chains 72 links along land of William Sneden and Tunis Haring to land of Berard and Beginning. Containing 1.09 acres.

(n) Piece or parcel of salt meadow in Orange Salt meadow known and designated on a map of said salt meadow, made by the managers thereof and dated October, 1877, as "lot No. 7" Tappan tract. Bounded east by lots 9 and 10 said Tappan tract. North by lot 6 of said Tappan Tract. South by Creek known as "Kromme Kill" West partly by said Creek and partly by land now or formerly of Charles B. Wood and known as Lot 8 of said Tappan Tract. Being about 1.02 acres more or less.

Together with any land lying in the bed of any road or watercourse (to the center line thereof) adjacent to or traversing the above described premises and any strips or gores of land lying between the tract first hereinabove de-
[fol. 105] scribed and the line formed by the southern and western boundary lines of salt meadow Lot A and the western boundary lines of salt meadow Lots 2, 5, 8, 22A, 21, 28, 29, 31, 45 and 57 above listed.

Together with all the right, title and interest, if any, of the owners of the above described premises in and to the lands under water and the waters and shores abutting the lands in the above described premises.

Resolved, that all descriptions and notices required to be made, filed and served, to carry this resolution into effect, be signed in the name of the Commissioners of the Palisades Interstate Park by the Vice President and attested by the Secretary or Assistant Secretary, and it is further

Resolved, that this resolution be entered in the minutes of this meeting and a copy thereof certified by the Assistant Secretary forwarded to the Governor of the State of New York and his approval obtained.

I, Elbert W. King, Assistant Secretary of the Commissioners of the Palisades Interstate Park, do hereby certify that the foregoing is a true copy of a resolution duly adopted at a meeting of said Commissioners, held in the city of New York, N. Y., on the 9th day of October, 1928, and of the whole thereof; that said resolution was offered by Commissioner Sutro who moved its adoption; that said resolution was seconded by Commissioner Osborn; that

said resolution was adopted unanimously,—a quorum of [fol. 106] the Board of Commissioners of the Palisades Interstate Park being present.

In witness whereof I have hereunto set my hand and affixed the seal of said Commissioners of the Palisades Interstate Park at the City of New York, this 10th day of October, in the year One thousand nine hundred and twenty-eight.

Elbert W. King, Assistant Secretary. (Seal.)

Approval of Governor Smith

Office of the Governor of the State of New York

Pursuant to the provisions of Chapter 242 of the laws of 1928 and of the other applicable provisions of the laws of the State of New York, I, Alfred E. Smith, Governor of the State of New York, do hereby approve of the entry upon, taking possession of and the appropriation of real property within the town of Orangetown, County of Rockland, and State of New York, by the Commissioners of the Palisades Interstate Park, described in a resolution passed by said Commissioners on the 9th day of October, 1928, a copy of which resolution is hereto attached and made a part hereof.

Done at the Capitol, in the City of Albany, New York, this 10th day of October, 1928.

Alfred E. Smith, Governor.

[fol. 107] Description of Land Appropriated and Certificate That Same is Correct

The Commissioners of the Palisades Interstate Park, pursuant to Chapter 242, Laws of 1928, and the other applicable laws of the State of New York, and pursuant to a resolution adopted by said Commissioners on the 9th day of October, 1928, hereby makes an accurate description of the real property entered upon, and appropriated by the said Commissioners with the approval of the Governor of the State of New York for the People of the State of New York, for the purposes of a public and State park, as follows:

(Here followed the description printed supra in the extracts of the minutes of the Commission.)

Commissioners of the Palisades Interstate Park, by Franklin W. Hopkins.

STATE OF NEW YORK,
County of New York, ss:

The Commissioners of the Palisades Interstate Park hereby certify under their official seal that the foregoing description is correct.

Dated New York City, October 10, 1928.

Commissioners of the Palisades Interstate Park, by Franklin W. Hopkins, Vice-President. Attest: George W. Perkins, Secretary. (Seal.)

[fol. 108] Certificate of Secretary of State

STATE OF NEW YORK,
Department of State, ss:

I have compared the preceding copies of approval of the Governor, description of land appropriated and certificate that same is correct and certified copy of resolution adopted by the Commissioners of the Palisades Interstate Park at a meeting held October 9, 1928, in the matter of the appropriation by said Commissioners for the People of the State of New York, of real property at Piermont, town of Orangetown, Rockland County, New York, with the originals thereof on file in this Department, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the official seal of the Department of State, at the City of Albany, this eleventh day of October, one thousand nine hundred and twenty-eight.

Frank S. Sharp, Deputy Secretary of State. (Seal.)

[fol. 109] Approval of Conservation Commissioner

Office of the Conservation Commissioner of the State of New York

Pursuant to the provisions of Chapter 242 of the laws of 1928 and of the other applicable provisions of the laws of the State of New York, I, Alexander MacDonald, Conserva-

tion Commissioner of the State of New York, do hereby approve of the entry upon, taking possession of and the appropriation of real property within the town of Orangetown, County of Rockland, and State of New York, by the Commissioners of the Palisades Interstate Park, described in a resolution passed by said Commissioners on the 9th day of October, 1928, a copy of which resolution is hereto attached and made a part hereof.

Dated Albany, New York, this 10th day of October, 1928.

Alexander Macdonald, Conservation Commissioner.

(Attached to certified copy of resolution.)

[fol. 110] Certificate of Secretary of State

State of New York, ss:

Department of State

I have compared the preceding copies of approval of the Conservation Commissioner and certified copy of resolution adopted by the Commissioners of the Palisades Interstate Park at a meeting held October 9, 1928, in the matter of the appropriation by said Commissioners for the People of the State of New York, of real property at Piermont, town of Orangetown, Rockland County, New York, with the originals thereof on file in this department, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the official seal of the Department of State, at the City of Albany, this eleventh day of October, one thousand nine hundred and twenty-eight.

Frank S. Sharp, Deputy Secretary of State. (Seal.)

(This was attached to approval of Conservation Commissioner and certified copy of resolution.)

[fol. 111] Notice

To Sparkill Realty Corporation, Standard Trap Rock Corporation.

Sirs: Please take notice that on October 11, 1928, there was filed in the office of the Secretary of State, at Albany, New York, an accurate description of land, duly certified to be correct, upon which was endorsed a notice that the

property described therein was appropriated by the People of the State of New York for public and State park purposes, pursuant to Chapter 242 of the laws of 1928, and the other applicable laws of the State of New York, with the approval of the Governor.

A duplicate of such description and certificates and notices are hereto annexed and made a part hereof, and are herewith served upon you pursuant to the laws of the State of New York.

Dated New York, October 11, 1928.

Commissioners of the Palisades Interstate Park, by Franklin W. Hopkins, Vice-President.

Attest: Elbert W. King, Assistant Secretary. (Seal.)

[fol. 112] Endorsement

Proposal No. —

Palisades Interstate Park

In the Matter of the Appropriation of Real Property by the People of the State of New York

The Commissioners of the Palisades Interstate Park hereby gives notice and certifies, pursuant to Chapter 242 of the Laws of 1928 and the other applicable Laws of the State of New York, that the real property described herein is appropriated by the People of the State of New York for public and State park purposes with the approval of the Governor.

Dated New York, October 10th, 1928.

Commissioners of the Palisades Interstate Park, by Franklin W. Hopkins, Vice-President. Geo. W. Perkins, Secretary.

[fol. 113] Exhibit 2 to Affidavit of White

October 18, 1927.

Messrs. Appleton, Rice & Perrin, 59 Wall Street, New York City.

Re Tallman Mountain

Dear Sirs: Your letter of October 14th, together with other data and information furnished us by you or Mr.

Hemmens have been submitted to and considered by the Commissioners of the Palisades Interstate Park, who have requested us to report to you that at their meeting today it was decided and resolved by them that their counsel be instructed to take no steps for the condemnation of the Tallman Mountain property.

The Commissioners would be glad to consider buying the property if it could be secured at a figure which they regard as reasonable, but the valuation placed upon it by your client and the Sparkill Realty Corporation cannot even furnish a basis for negotiation.

We are returning to you herewith the record of test borings made by the Giles Drilling Company, Inc., which you loaned to us, and for which we thank you.

Very truly yours, Augustus L. Richards.

Enc.

[fol. 114] EXHIBIT 3 TO AFFIDAVIT OF WHITE

October 18, 1927.

Henry J. Hemmens, Esq., 64 Wall Street, New York City.

Re Tallman Mountain

DEAR SIR: Your letter of October 14th, together with other data and information furnished us by you or Messrs. Appleton, Rice & Perrin have been submitted to and considered by the Commissioners of Palisades Interstate Park, who have requested us to report to you that at their meeting today it was decided and resolved by them that their counsel be instructed to take no steps for the condemnation of the Tallman Mountain property.

The Commissioners would be glad to consider buying the property if it could be secured at a figure which they regard as reasonable, but the valuation placed upon it by your client and the Standard Trap Rock Corporation cannot even furnish a basis for negotiation.

Very truly yours, Augustus L. Richards.

[fol. 115] EXHIBIT 4 TO AFFIDAVIT OF WHITE

October 16, 1928.

Messrs. Appleton, Rice & Perrin, 52 Wall Street, New York City.

Attention Mr. Perrin

GENTLEMEN: On behalf of the Commissioners of the Palisades Interstate Park, I wish to inform you that the personal property upon the premises recently appropriated at Taulman Mountain, remains there at the risk of your clients. If you desire to have it remain there for a short time, the Commission has no objection, it being distinctly understood, however, that the Commission has no responsibility therefor.

Major Welch will be ready to cooperate with Mr. Dana or representatives of your corporation in the preparation of the inventory. I shall be glad if you will have your clients get in touch with him.

Yours very truly, Carl S. Stern.

CSS/EB.

c/c to Major W. A. Welch, c/o Palisades Interstate Park, Bear Mountain, N. Y. Commissioners Palisades Interstate Park, 25 Broadway, New York City.

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

UNITED STATES OF AMERICA,
Southern District of New York,
State, County, and City of New York, ss:

Frederick C. Sutro, being duly sworn, says:

I reside at Basking Ridge, New Jersey. I am a member of the Commissioners of the Palisades Interstate Park of the State of New York and of the State of New Jersey, and have been a member of each Commission since 1912. I was treasurer of the New Jersey Commission from 1913. Since 1926 I have been president of the New Jersey Commission succeeding the late Richard V. Lindabury.

I have read the affidavit of J. DuPratt White, verified April 1, 1929, and I concur in the statements therein.

During Mr. White's absence abroad, I kept in close touch with the situation, attended all meetings of both Commis- [fol. 117] sions, and frequently visited the property in question, with which I had been familiar since 1913. I know of my own knowledge that the statements in Mr. White's affidavit as to happenings during the period he was abroad are true.

Frederick C. Sutro.

Sworn to before me this 1st day of April, 1929. J. F. Plaisted, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 624. Reg. No. 0-17-A. Commission expires March 30th, 1930.

[fols. 118 & 119] In United States District Court

[Title omitted]

Supplementary Affidavit of J. Du Pratt White in Opposition to Application for Injunction

State of New York,
County of New York, ss:

J. Du Pratt White, being duly sworn, deposes and says:

I am informed that upon the oral argument, plaintiffs' counsel said in substance that he knew of no moneys or other property of the Commission other than the $600,000 allocated under the bond issue. In the brief of plaintiffs served upon us at the argument, there are statements to the effect that the Commission is "limited" to the $600,000 allocated, or "some part thereof" (see e. g., plaintiffs' brief, p. 29).

There is, I am informed, no such allegation in the complaint or in the moving affidavits, and no statement about [fol. 120] this matter appeared in our earlier affidavits in opposition.

In view of the statements upon the argument, I wish to put upon the record that the New York Commission, on October 9, 1928 (when the Commission offered the plaintiffs

$500,000 for the property in suit), and on October 11, 1928 (when the said property was appropriated), had on hand over and above the bond moneys appropriated by L., 1926, Ch. 16, reappropriated by L. 1928, Ch. 75, Part V, and any allocation therefrom—moneys, securities and other properties which could be lawfully used for the acquisition of lands for park purposes in any manner, and which I am informed and believe were of a value in excess of $500,000.

J. Du Pratt White.

Sworn to before me this 17th day of April, 1929.
James D. McCauley, Notary Public, Queens Co.
Cert. filed in N. Y. Co., etc. (Seal.)

[fol. 121] In United States District Court

[Title omitted]

Motion to Dismiss

Now come J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, named as defendants in the above entitled action, and move the Court to dismiss the bill of complaint filed herein on or about the 19th day of March, 1929, upon the grounds and reasons as follows:

(1) On the ground that this Court has not jurisdiction of the subject of the action;

(2) On the ground that the said bill of complaint does not state facts sufficient to constitute a cause of action;

[fol. 122] (3) On the ground that the said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against these defendants.

Please take notice that the aforesaid motion to dismiss the bill of complaint herein will be brought on for hearing before this Court on the 6th day of April, 1929, at ten o'clock in the forenoon of that day, at the room of the Circuit Court of Appeals in the Courthouse, Post Office Build-

ing in the Borough of Manhattan, City and State of New York, and that the undersigned will then and there apply for an order dismissing the said bill of complaint upon the grounds aforesaid and for such other and further relief as to the Court may seem just and proper.

Dated New York, April 1, 1929.

Engelhard, Pollak, Pitcher & Stern, Solicitors for Defendants J. Du Pratt White, Franklin W. Hopkins et al. Walter H. Pollak, Carl S. Stern, of Counsel, 74 Trinity Place, Borough of Manhattan, City of New York.

To Henry J. Hemmens, Esq., Solicitor for Plaintiff Sparkill Realty Corporation, 43 Cedar Street, New York City; Cullen & Dykman, Esqs., Solicitors for Plaintiff Standard Trap Rock Corporation, 177 Montague Street, Brooklyn, N. Y.

[fol. 123] In United States District Court

[Title omitted]

Motion to Dismiss

Now come Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, named as defendants in the above entitled action, and move the Court to dismiss the bill of complaint filed herein on or about the 19th day of March, 1929, upon the grounds and reasons as follows:

(1) On the ground that this Court has not jurisdiction of the subject of the action;

(2) On the ground that the said bill of complaint does not state facts sufficient to constitute a cause of action;

(3) On the ground that the said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against these defendants.

[fol. 124] Please take notice that the aforesaid motion to dismiss the bill of complaint herein will be brought on for hearing before this Court on the 6th day of April, 1929, at

ten o'clock in the forenoon of that day, at the room of the Circuit Court of Appeals in the Courthouse, Post Office Building in the Borough of Manhattan, City and State of New York, and that the undersigned will then and there apply for an order dismissing the said bill of complaint upon the grounds aforesaid and for such other and further relief as to the Court may seem just and proper.

Dated New York, April 1, 1929.

James Gibson, Second Assistant Attorney General, Solicitor for Defendants Hamilton Ward, etc., and Alexander MacDonald, etc., The Capitol, City of Albany, State of New York.

To Henry J. Hemmens, Esq., Solicitor for Plaintiff Sparkill Realty Corporation, 43 Cedar Street, New York City; Cullen & Dykman, Esqs., Solicitors for Plaintiff Standard Trap Rock Corporation, 177 Montague Street, Brooklyn, N. Y.

[fol. 125] In United States District Court, Southern District of New York

Sparkill Realty Corporation and Standard Trap Rock Corporation, Plaintiffs,

against

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker, and Frederick H. Osborn, Constituting the Board of Commissioners of the Palisades Interstate Park; Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, Defendants

Before Manton, C. J., Goddard and Bryant, D. JJ., Convened Pursuant to Section 380 of the Judicial Code, U. S. Code of Laws

Decree

This cause having come on to be heard under an order to show cause dated March 19, 1929 and having been argued

by counsel and due deliberation had, and the Court being of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section [fol. 126] 6, Article I and Section 4, Article VII of the Constitution of the State of New York, and that no appropriation of funds has been made by the said legislature for said purpose and that plaintiffs are daily suffering great and irreparable loss from the continued unlawful occupation of their property, deterioration of buildings and machinery and impossibility of operation for the redress of which they are without adequate remedy at law, it is

Ordered, adjudged, and decreed as follows:

First. Pending final decree in this action and until the further order of this Court the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of Chapter 242 of the Laws of 1928 of the state of New York or a certain notice, description or certificate of defendants, Board of Commissioners of Palisades Interstate Park, dated October 11, 1928, with reference to the property hereinafter described be and hereby are enjoined and restrained, jointly and severally, from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs by entry and appropriation as aforesaid or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for non-compliance by plaintiffs with said act, no-

tice, description or certificate or from continuing in possession of plaintiffs' said property, being:

All those certain lots or parcels of land situate at Piermont, in the Town of Orangetown, County of Rockland and State of New York, and bounded and described as follows:

[fol. 127] Beginning at the northwest corner of said parcel at the center of the public road leading to Rockland and running thence South 43½ degrees east 455 feet more or less to a stone set in the fence; thence South 39 degrees 15 minutes west 317 feet to land now or formerly of Rodman G. Moulton; thence along the same as the fence now stands South 40 degrees east 38 feet; thence South 32 degrees east 279 feet; thence South 24 degrees east 175 feet more or less to land formerly of James Iserman, deceased; and southeasterly corner of said land of Rodman G. Moulton; thence along said Moulton's land about South 70 degrees west 16 chains 50 links to the center of the public road leading from Piermont to Rockland; thence along the center of said road South 14 degrees east about 5 chains 30 links; thence along said road South 15 degrees east 3 chains and 21 links; thence along said road South 5 degrees west 2 chains and 88 links to a hickory tree; thence along said road South 19 degrees west 1 chain 91 links; thence North 77½ degrees east 18 chains 17 links to a stake on the east side of a small brook; thence South 30½ degrees east 4 chains 30 links to a stone wall; thence South 26½ degrees east 59 links; thence North 55 degrees east 808 feet 6 inches; thence North 20 degrees west 120 feet; thence North 52 degrees east 132 feet; thence South 35 degrees 30 minutes east along the land now or formerly of George A. Jones 904 feet to a cedar tree; thence North 17 degrees west 1,000 feet; thence North 30 degrees west 566 feet to the south side of a spring on land of David Holzworth; thence South 66 degrees west 460 feet; thence North 29 degrees west 90 feet 6 inches to a hickory tree at the northwest corner of said Holzworth's land; thence North 46¾ degrees east 7 chains 5 links; thence North 19 degrees east 1 chain 56 links; thence North 14-¼ degrees east 1 chain 97 links; thence North 22 degrees west 2 chains 10 links; thence North 7 degrees east 5 chains 80 links, thence North 10½ degrees east 4 chains 61 links; thence North 80 degrees east 80 links; thence North 10 degrees west to the

Corner Kill; thence along same easterly, southerly and easterly to a meadow late of James C. Smith; thence along the same North 8-½ degrees west about 10 chains 65 links to a meadow now or late of Tunis A. Smith; thence North 87 degrees east 2 chains 15 links to a ditch; thence North 10½ degrees west 7 chains 15 links to the Sloat Creek; thence South 39 degrees west 1 chain 59 links; thence South 64-¾ degrees west 63 links; thence North 89 degrees west 62 links; thence North 64-½ degrees west 77 links to a ditch; thence North 13-½ degrees west 2 chains and 68 links; thence North 23 degrees west 2 chains; thence North 53 degrees west 60 links; thence South 80 degrees west 2 chains 46 links; thence South 59 degrees west 52 links; thence South 32 degrees west 1 chain 37 links; thence South 24 degrees west 88 links; thence South 37 degrees west 1 chain 67 links; thence South 49-½ degrees west 1 chain 93 links to a stake at the South side of Sloat or Sparkill Creek east of the lowest bridge and at the east side of a mouth or a ditch leading into the said Sparkill; thence South [fol. 128] 69 degrees west along the said Sparkill Creek 5 chains 40 links; thence South 43 degrees east 7 chains 50 links to a stake in a stone heap; thence South 44-¼ degrees west 12 chains 36 links to the westerly line of land now or formerly Charles Taulman's; thence along the westerly line of land last mentioned North 49-¼ degrees west to land now or formerly of William Lawrence; thence South 33 degrees west 1 chain 43 links; thence South 40 degrees west 1 chain 45 links to the school lot; thence along the boundary line of the said school lot to the centre of the public road aforesaid; thence along the centre of said road to the place of beginning. Containing 104 acres and 25/100 of an acre, excepting from the said premises above described a small lot on the Rockland Public road belonging to Maria Briggs; being in dimensions 70 links front and rear by 3 chains 15 links deep.

Also beginning at a stake by the land formerly of Jacob Ackerson and running thence North 25 degrees west 5 chains 35 links to land now or late of James T. Blauvelt, thence North 28 degrees west 6 chains, thence North 17-½ degrees west 5 chains 58 links to a stake on line between lands now or formerly of James A. Hopson and Jacob M. Blauvelt; thence along said line South 78 degrees 45 min-

utes west 815 feet 5-½ inches; thence North 18 degrees 30 minutes west 335 8/10 feet to land now or formerly of George A. Jones; thence North 78 degrees 45 minutes east 1177 feet 5-½ inches to the foot of the hill near the spring; thence in a southeasterly direction to a ditch near the foot of the hill; thence along the said ditch South 19 degrees east to a stake 1 chain 6 links in a northerly direction from the southwesterly corner of a salt meadow lot now or late belonging to the heirs of Lawrence Briggs deceased; and thence in a straight line to the place of beginning. Containing 19 acres and 58/100 of an acre.

Also bounded on the east by land formerly of John L. Brownell, on the South by land now or formerly of Jacob M. Blauvelt, on the west by an old stone ditch and on the north by land now or formerly of George A. Jones, containing about 1⅓ acres.

Also all that certain piece, parcel or tract of land situate on the easterly side of Tallman's Mountain at or near Piermont, New York, in the Town of Orangetown, County of Rockland, and more particularly bounded and described as follows, viz: First: two acres more or less in Piermont, bounded, north, south and west by land of J. S. Homans and east by Elisha Ruckman against which the name of "Mrs. Anna Doersch" appears on the assessment roll of said town for the year 1878, and the name "Mrs. Conrad Doersch" in the tax roll of said town for said years and on which a building known as the Lion Brewery was standing in the year 1878 and Second, one and seven tenths acres more or less at or near Piermont bounded, beginning [fols. 129 & 130] at a hickory tree at the northwest corner thereof, adjoining the land of J. O. Gorham; thence south twenty-five (25) degrees thirty (30) minutes east ninety and one-half (90-½) feet to a chestnut tree at the southwest corner thereof; thence north sixty-five (65) degrees east along said Gorham's land four hundred and sixty (460) feet to the Salt Meadows and other land of said Gorham; thence north twenty-seven (27) degrees forty-five minutes west along the same two hundred and thirty-two (232) feet and thence south forty-seven (47) degrees forty-five (45) minutes west along said Gorham's land four hundred and seventy (470) feet to the point or place of beginning. Against which the name of Anna Doersch appears on the tax roll for the year 1872.

Also the following meadow lots as shown on the map of the Orangetown Salt Meadows, made by James S. and James S. Harring, Jr., Surveyors, in October 1877, a copy of which map is filed in the Town Clerk's office in the town of Orangetown and also in the Comptroller's office in the State of New York, at Albany, as follows:

Lots in the Tappan tract of the Orangetown map; 1, 2, 5, 6, 7, 8, 16, 17, 18, 21, 22, 22a, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 45, 47 and 57.

Second. From doing any acts or things as aforesaid which may in any respect interfere with the ownership or possession of the plaintiffs of the aforesaid property or their free use and enjoyment thereof.

Third. That the defendants' motions to dismiss the bill of complaint in the above entitled cause be and the same hereby are denied.

Dated June 12th, 1929.

Martin T. Manton, C. J. Henry W. Goddard, D. J. Frederick H. Bryant, D. J.

A true copy. Alex Gilchrist, Jr., Clerk. (Seal of District Court of U. S.)

[fols. 131 & 132] In United States District Court

[Title omitted]

Before Martin T. Manton, Circuit Judge, and Henry W. Goddard and Frederick H. Bryant, District Judges, Convened Pursuant to § 380 of the Judicial Code, U. S. Code of Laws

Suit to restrain the defendants from entry, appropriation and continuance in possession of plaintiffs' property, pur-
[fol. 133] suant to a state statute which is claimed to be in contravention of the State and Federal Constitutions. Injunction granted.

Cullen & Dykman, Esqs., Solicitors for Plaintiff, Standard Trap Rock Corp.; William N. Dykman, Esq., Jackson A. Dykman, Esq., Timothy J. Shea, Esq., of Counsel.

Henry J. Hemmens, Esq., Solicitor for Plaintiff, Sparkill Realty Corp.

Engelhard, Pollak, Pitcher & Stern, Esqs., Solicitors for Defendants, White, Hopkins, Partridge, Perkins, Sutro, Smith, Childs, Harriman, Baker and Osborn sued as constituting the Board of Commissioners of the Palisades Interstate Park.

James W. Gibson, Esq., Second Asst. Attorney General, Solicitor for Hamilton Ward, Attorney General, and Alexander MacDonald, Conservation Commissioner.

Walter H. Pollak, Esq., Carl S. Stern, Esq., G. Frank Dougherty, Esq., on the brief.

OPINION

MANTON, Circuit Judge:

The plaintiff, Sparkill Realty Corporation, owned land at Piermont, Rockland County, New York, upon which there is a stone quarry and which was leased for twenty years with a renewal privilege of twenty years, to the plaintiff, Standard Trap Rock Corporation. The defendants are the Board of Commissioners of the Palisades Interstate [fol. 134] Park, a body politic, created pursuant to Chapter 170 of the Laws of 1900 (New York). This corporate body has the power to sue and be sued and to make and adopt by-laws to regulate its proceedings (Laws, 1928, ch. 242, § 746, Part IX, art. 16 of the Conservation Law of the State). The Attorney General is made a party by virtue of § 68 of the Executive law of the State authorizing his appearance in causes involving the constitutionality of any act of the legislature. The Conservation Commissioner is made a party by virtue of §9 of the Conservation Law which authorizes him to defend actions of this kind.

The commissioners have power to acquire land by condemnation according to a procedure prescribed by chap. 170 of the laws of 1900, but by its provisions they may not acquire title or enter into possession of such land until the amount awarded in a condemnation proceeding in the Supreme Court in the Ninth Judicial District shall have been paid. On June 11, 1927, notice was given to the plaintiffs that a resolution had been adopted by the Board of Commissioners of the Palisades Interstate Park, that preliminary steps be taken toward the acquisition of their property for park purposes. They were notified by letter that the information and valuation filed on October 14, 1927, by the

plaintiffs had been submitted to the Board of Commissioners and that at a meeting of the Board held on October 18, 1927, it had been decided and resolved that its counsel be instructed to take no steps for the condemnation of the property. This letter was acknowledged on October 19, 1927, by the attorneys for the Standard Trap Rock Corporation. The corporation thereupon proceeded with its plans for the development of the quarry which had been [fol. 135] held in abeyance since the notice of June 11, 1927. During the period between October 18, 1927, and October 11, 1928, the plaintiff Standard Trap Rock Corporation erected its plant at a cost of about One million Dollars.

On October 11, 1928, notice was served on the plaintiffs that on that day there had been filed in the office of the Secretary of the State of New York, a description of the land upon which was endorsed a notice that the property had been appropriated for public and state park purposes. Thereupon, the Board of Commissioners entered upon the property and have since remained in possession with a patrolman on guard. This entry was made pursuant to an alleged appropriation and entry under § 761 of the Conservation Law (L., 1928, chap. 242, § 761). A valid exerise of power by the Commissioners under the Act of 1928 would have caused the title of land appropriated to pass from the owner to the people of the State. (§ 59, subdiv. 3 of the Conservation Law; Kahlen vs. State of New York, 223 N. Y., 383.)

Section 761 provides:

"In addition to the various methods of acquiring land provided for in this part of this article, the commissioners of the Palisades Interstate Park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the Conservation Law."

New York State Constitution (art. 3, § 21) provides that no money shall ever be paid out of the treasury of this state or if its funds, or any of the funds under its management [fol. 136] except in pursuance of an appropriation by law. Chapter 602 of the Laws of 1924 provides for the issuance of bonds of the state not exceeding Fifteen million Dollars, the proceeds of which were to be paid into the treasury and so much thereof as was necessary was appropriated for the development of, improvement and extension of state

parks, including the acquisition of land for that purpose. Section 4 provided in part as follows:

"The moneys for the development, improvement and extension of the Palisades Interstate Park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate Park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended."

Under the Laws of 1900 chap. 170, § 5 (§ 748 of the Conservation Law), it is provided that the commissioners "shall have power to take in fee or otherwise, by purchase, gift, devise or eminent domain," lands situated near the park. The procedure necessary to acquire lands by eminent domain is stated. A map of the lands to be acquired must be filed with the clerk of the county in which the lands are situated (§ 749). A notice of intention to take the lands must be published (§ 750). The Supreme Court in the Ninth Judicial District shall then appoint three (3) disinterested persons, freeholders and residents of the state, commissioners and appraisers (§ 751). The commissioners meet and pass upon the claims of the owners of the lands (§ 752). The report of the commissioners is filed in the county clerk's office and subject to revision or [fol. 137] confirmation by the Supreme Court (§§ 753, 754).

By § 759 of the Conservation Laws (L., 1900, ch. 170, § 16), the state may not acquire the title to or re-enter the possesson of the lands until the amount awarded is paid to the owners or the county clerk. Assuming that the moneys appropriated by chap. 602 of the Laws of 1924 were reappropriated by chap. 75, Part V of the Laws of 1928, the commissioners cannot use them except in the manner specified by the original appropriation law, that is, "the moneys shall be expended and the land shall be acquired under the provisions of chap. 170 of the laws of 1900 as amended." there was never an appropriation of money for "entry and appropriation." There has been an appropriation for payment in condemnation. If this be true, the entry and appropriation of the land in question was illegal. (Pauchogue vs. L. I. State Park Comm., 243 N. Y., 15.)

The plaintiff Sparkill Realty Corporation has, by affidavit, fixed the value of its property at Three million Dol-

lars. The Standard Trap Rock Corporation must pay as a minimum, Thirty-five thousand Dollars per year, the lease being fixed at 7¢ per cubic yard up to 500,000 yards and for production in excess a royalty of 6¢ per cubic yard up to 600,000 cubic yards and a royalty of 5¢ per cubic yard on all above. It is asserted by the Sparkill Realty Corporation that the income by reason of this lease was approxmately Eighty thousand Dollars annually. There are estimates which fix the value of the buildings and machinery installed for the crushing plant at One Million Dollars and that the income to be derived therefrom by the Standard Trap Rock Corporation would approximate over Five hundred thousand Dollars per year. Affidavits place the valu- [fol. 138] ation of the property, together with the quarry and plant at Four million Dollars. Opposed to this, is the affidavit of one of the commissioners who placed a valuation on the property on October 14, 1927, stating that it was unimproved and assessed for taxing purposes at $15,000. The property consists of 113 acres of upland and 57½ acres of marsh land. Commissioner White swears: "The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property was worth less than $600,000, and that the obligation of the State would not exceed that sum."

The jurisdiction of this court is invoked upon the claim that the plaintiffs' property is being taken without due process in violation of the 14th amendment of the Federal Constitution. That no certain and adequate method of making compensation to the plaintiffs is shown because the statute under which the entry and appropriation was made relegates the plaintiffs to the Court of Claims of the State, but fails to appropriate money to pay for the property. Also that it does not sufficiently pledge the credit of the State; even though the Court of Claims of the state be fully vested by the statute with jurisdiction to determine the amount of compensation, there is no appropriation by the legislature of such an amount as to be reasonably certain to cover an award that may reasonably be made. (Rockaway Pacific Corp. vs. Stotesbury, 255 Fed., 345.)

[fol. 139] The statute creating the commission of the Palisades Interstate Park (chap. 170 of the Laws of 1900) authorizes the acquisition of real estate by condemnation only. Chap. 602 of the Laws of 1924 which was approved by a vote of the People of the State, provided for the issuance of bonds and that compensation for the land acquired out of their proceeds by the Board must be ascertained and the land acquired by condemnation. Chapter 16 of the Laws of 1926 made specific appropriations for the acquisition of lands by condemnation proceedings, as provided in the Laws of 1900, and allocated to the Palisades Interstate Park $3,500,000 from the sale of bonds authorized by the Law of 1924. The Conservation Law of 1928 reorganizing this defendant Board of Commissioners, repealed the Laws of 1900, chap. 170, but re-enacted all the provisions of that act governing the acquisition of land by condemnation. Section 80 of the General Construction Law of the State provides:

"If any provision of law be repealed and, in substance, reenacted, a reference in any law to such repealed provision shall be deemed a reference to such reenacted provision."

Therefore, pursuant to chap. 242 of the Laws of 1928, land may be acquired only under the sections of the Law of 1900 if payment is to be made from funds appropriated by chap. 16 of the Laws of 1926. Section 761 of the Conservation Law gives the Commission additional power to acquire land by entry and appropriation in the manner provided for in §59 of the Conservation Law and §59, sub. sec. 3 provides that from the time of the service of notice of filing description and certificate on the owners of the land [fol. 140] appropriated, the entry and appropriation shall be deemed complete and thereupon such property shall become and be the property of the people of the state. Thus there is a distinction between taking the land by entering and appropriation under §59 of the Conservation Law and by condemnation proceedings as provided by Chap. 170 of the Laws of 1900. This is not merely a technical matter of procedure. Substantial rights are affected by entry and appropriation for it divests the owners of title the moment notice of appropriation is served and in this instance, the compensation, when that was done, was limited to some part

of $600,000 which was allocated to the Palisades Interstate Park. If the land was condemned, the owner would have full ownership and hold the fee until the land was fully compensated for. Moreover, under chap. 242 of the Laws of 1928, which re-enacted chap. 170 of the Laws of 1900, it was necessary to complete the condemnation proceedings within eighteen months after the first publication and notice of application to condemn which, in effect, limited the time of payment, and the section required a report to the legislature of the amount awarded an owner so that appropriation might be made, if not already available. The approval of the people given in 1924 (§4, chap. 602 of the Laws of 1924) provided:

"The moneys for the development, improvement and extension of the Palisades Interstate Park shall be expended and the land shall be acquired by the Commissioners of Palisades Interstate Park under the provision of Chapter 170 of the Laws of 1900 as amended. * * *"

[fol. 141] Parks other than the Palisades Interstate Park including the Long Island parks are dealt with in §4, and it states:

"Except as in this section otherwise provided such lands may be acquired in such manner as the legislature may provide, which may be either by purchase, by condemnation, or by entry and appropriation with submission to the court of claims or supreme court for the determination and award of damages for such entry and appropriation, or by one or more of such methods as the legislature may provide."

This exception indicates the restriction upon the commissioners, giving the power of entry and appropriation in the case of parks and parkway extensions other than the Palisades Interstate Park, and this involved an assurance to the owners of the land by making payment of compensation a pre-requisite of vesting of title in the state. It also protected the people against a floating debt. The intent of the legislature to preserve such protection intact is very clear from the language of the act making the appropriation of moneys for state park purposes on the authority of which the defendants have acted (Chap. 16 of the Laws of 1926). A special provision is made for the expenditure

of moneys and acquisition of lands by the commissioners of the Palisades Interstate Park by the laws under which and according to which they are directed to act. The Legislature of 1928, enacting §761 of the Conservation Law, attempted to dispense with the provisions of the Laws of 1900 (ch. 170), and apparently disregarded the prohibitory provisions of §4, chap. 602 of the Laws of 1924 (§2, subdiv. 2 of [fol. 142] chap. 16 of the Laws of 1926) and vested the commissioners with power to acquire land by entry and appropriation with money appropriated by those acts. This was inconsistent with prior legislation and contrary to the approval of the people by vote in the election of 1924. The authorization of the people to the Interstate Park Commissioners was to expend the moneys appropriated for the acquisition of lands for park purposes in the manner specified in chap. 170 of the Laws of 1900. The commissioners were thus limited. In the absence of authority by the vote of the people, no such change can be made in a referendum act which would permit the use or expenditure of moneys provided for by such act for any other purpose or in any different manner than that specially stated in the referendum act, for it is there the will of the people is expressed and their affirmative vote thereon must control the expenditure of the money and the later legislative enactments cannot change or modify the basic requirements in the particular law save by §4, art. 7 of the Constitution. (Half Moon Bridge Co. vs. Canal Bd., 91 Misc., 600.)

The Laws of 1928 (chap. 242) prescribing a new manner of acquisition of land by the commissioners, was in direct conflict with the referendum act and of no force or effect in the absence of funds separately appropriated, and the Palisades Park Commissioners had no power to acquire, by entry or appropriation, lands which must be paid for out of the bonds appropriated by the referendum of 1924. The board attempted to procure an allocation of $600,000 for the acquisition of lands in the Towns of Orangetown and Clarkstown without any division between the two and attempted to set it aside out of the sum appropriated by chap- [fol. 143] ter 16 of the Laws of 1926, but no part of it has been paid to the plaintiffs and the allocation itself was not made within two years next after the passage of the appropriation act of 1926. This reappropriation failed to be

made within the requirements of §21 of art. 3 of the State Constitution and no payments having been made within two years next after the passage of chap. 16 of the Laws of 1926 which became a law February 24, 1926, the entry upon and the appropriation of the plaintiffs' lands by the commissioners is unlawful because no proper provision was made for a convenient and adequate source and means of payment of compensation for the lands so appropriated. This taking of property was contrary to the Fourteenth Amendment as well as the State Constitution (art. 1, §6) for it was taking private property for public use without just compensation or making provision therefor. Section 50 of the Conservation Law (found in art. 3 entitled Divisions of Land and Forests) defines the powers and duties and procedure for carrying out the provisions of Art. 3. That section gives the power to the conservation department to establish, acquire control and manage state parks outside of the several reserves, parks and other state lands described in the article and "to acquire lands for such purposes when moneys have been appropriated therefor." Under subdiv. 7 of §59, the owner is relegated to presentation of a claim in the Court of Claims and money must be appropriated for payment. And art. III of the Constitution of the State forbids payment out of the treasury of the state of any of its funds or any of the funds under its management, except in pursuance of an appropriation by law. It is not enough for the owner of land taken by entry under §59 to present a [fol. 144] claim thereunder in the Court of Claims unless there has been an appropriation for its payment. An award of the Court of Claims without an appropriation creates no right to payment out of the treasury.

Chapter 170 of the Laws of 1900 or the alternative procedure provided in §§747 and 760 of the Conservation Law, by the provisions of which title does not pass until the award has been paid, violates no constitutional rights, whereas §59 of the Conservation Law does, for under it entry and service by notice vests title in the people without an appropriation therefor. Therefore, the plaintiffs are without remedy. There is no impartial tribunal where their claims can be adjusted. Such taking is illegal and void as violative of the Fourteenth Amendment, §1 of the Constitution of the United States. Adirondack R. R. Co.

vs. N. Y. State, 176 U. S. 335; Backus vs. Union Depot Co., 169 U. S., 557; Sweet vs. Rechel, 159 U. S., 380.

It is not enough to say that $600,000 has been allocated for the acquisition of plaintiffs' land pursuant to the provisions of sub. sec. 2, §1, chap. 16 of the laws of 1926, reappropriated chap. 75, Part V of the Laws of 1928. Indeed, the alleged appropriation seems to comprise lands to be taken in the towns of Clarkestown and Orangetown, whereas plaintiffs' property is situated entirely in the town of Orangetown. But if sufficiently appropriated, it is entirely insufficient in amount. Since money was not provided to pay an award therefor, the statute is in conflict with the 14th Amendment (Rockaway Pacific Corp. vs. Stotesbury, 255 Fed., 345; Pauchogue vs. L. I. State Park Comm., 243 N. Y., 15). In the interval between the first (243 N. Y., 15) and the second (248 N. Y., 635) considera- [fol. 145] tions of the Pauchogue case, there was a gift to the state of $250,000 with interest to pay for the land there taken and another entry and appropriation was made thereafter under the claim that the $250,000 was sufficient to pay for the property taken.

The contention that the State is a necessary party is without force (See Hopkins vs. Clemson College, 221 U. S., 636; Pennoyer vs. McConnaughy, 140 U. S., 1).

The defendants refer to Belknap vs. Schild, 161 U. S., 10, and Crozier vs. Krupp, 224 U. S., 290, urging that within these decisions there was a pledge of the faith and credit of the state and this was sufficient provision for just compensation. These cases were bills in equity to restrain infringement of plaintiffs' patents on devices used in the national defense. Schild's suit was brought against the commanding officer of the navy yard, a civil engineer in the navy, an assistant naval constructor, and an employee of the yard, for an accounting and injunction against the future use of the caisson gate which was already a part of a dry dock and alleged to contain an improvement patented by the plaintiff, and for the destruction of the gate or its delivery to the plaintiff. It had been manufactured by the officers of the United States out of materials belonging to it. The court speaks of the property as already in the possession of the United States describing an article manufactured by officers and employees out of materials and upon

property belonging to the United States. In the Crozier case, the bill of complaint alleged that the plaintiff owned the patent for improvement in recoil-brake apparatus for guns used by the government in its ordnance department and the defendant was the chief of ordnance of the United [fol. 146] States army. The court referred to the "intangible nature—patent rights—of the property taken, the great possibilities in the essential operations of government that such rights may be invaded by incorporating them into property of a public character, of the vital public interest involved in the subject-matter of the patents in question and the grave detriment to the very existence of government which might result from interference with the right of the Government to make and use instrumentalities of the character of those with which the patents in question are concerned" and concluded that the pledge of good faith of the government which the statute plainly implied to appropriate for and pay compensation when ascertained, was undoubtedly a full and adequate provision for the exercise of the power of eminent domain which was provided by the statute. The court confined discussion to the particular case before it. These cases are not applicable here where the Commission has elected to proceed under a statute which cannot constitutionally be invoked in the absence of an appropriation and therefore furnishes no protection and warrants an injunction.

It is no answer to say that by such entry and appropriation title was forced on the state. The possession was unlawful.

Nor is the action one for ejectment (Hopkins vs. Clemson College, 221 U. S., 636; U. S. Freehold Land Co. vs. Gallegos, 89 Fed., 769).

There is not a sufficient pledge of the general credit of the state by reason of the provision of §59 of the Conservation Law which provides that the amount of the claim shall be paid out of the state treasury (Pauchogue Land Corp. vs. L. I. State Park Comm., 243 N. Y., 15; Newell vs. People, 7 N. Y., 9, 106). Nothing in this section attempted to create [fol. 147] a duty on the part of the comptroller to issue his warrant, or the state treasurer to honor the same, in the absence of an appropriation by the legislature. Payment would be contrary to the state constitution. Sub. div. 7 of

§59 adds nothing by way of a pledge of faith and credit (Sage vs. City of Brooklyn, 89 N. Y., 190).

In Hays vs. Port of Seattle, 251 U. S., 233, no land of the plaintiff was taken in the proceeding, the only question being whether by the obligation of his contract, he be held for the excavation of the waterway which was impaired in violation of §10 of art. 1 of the constitution. The Supreme Court held that at most there was a breach of contract for which he might be remitted to an action for damages under the Washington Code. In Joslin Co. vs. Providence, 262 U. S., 668, the municipality was forced to acquire land by condemnation and there was "an additional guaranty that the judgment obtained will be paid—and paid promptly—the owner under the statute may have execution issued against the city." In Bragg vs. Weaver, 251 U. S., 57, it was conceded that the taking was under the direction of public officers for public use and that there was an adequate provision for payment of such compensation as may be awarded. In Backus vs. Ford Union Depot Co., 169 U. S., 557, the property was taken under a statute entitling the authorities to entry and possession on payment or deposit of the sum fixed by the commissioners or a jury to be paid as compensation for such land. Kahlin vs. State of New York, 223 N. Y., 383, announced the doctrine that private property may not be taken for public use, for there is an absolute right of the owner to just compensation and provis-
[fol. 148] ion must be made for prompt determination and payment of such compensation from the public funds.

The injunction will therefore issue.

Dated June 7, 1929.

Martin T. Manton, Circuit Judge. Henry W. Goddard, District Judge. Frederick H. Bryant, District Judge.

[fol. 149] In United States District Court

[Title omitted]

Petition for Appeal and Order Allowing Same

The above named defendants, feeling aggrieved by the decree of interlocutory injunction entered in the above en-

titled cause on June 21st, 1929, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that the appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record of the proceedings and papers upon which the said decree was based, duly authenticated, be sent to the Supreme Court of the United States;

And your petitioners further pray that the proper order relating to the security, if any, to be required of them be made.

Dated New York, July 22nd, 1929.

Engelhard, Pollak, Pitcher & Stern, Solicitors for J. du Pratt White, Franklin H. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. [fol. 150] Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker, and Frederick H. Osborn, Constituting the Board of Commissioners of the Palisades Interstate Park. James Gibson, Second Assistant Attorney General, Solicitor for Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York.

Appeal as prayed for is hereby allowed.

Dated July 22nd, 1929.

Martin T. Manton, U. S. Circuit Judge.

[fol. 151] In United States District Court

[Title omitted]

Prayer for Reversal

Assignment of Errors

Now come the defendants in the above entitled cause and each of them and file the following assignment of errors, upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree of inter-

locutory injunction entered in this Court on the 21st day of June, 1929:

1. The Court erred in taking jurisdiction of this cause.

2. The Court erred in not dismissing the bill of complaint on the ground that it does not present a substantial federal question.

3. The Court erred in overruling the motion interposed by the defendants and appellants to dismiss the bill of complaint herein on the ground that the Court was without jurisdiction of the subject of the action.

[fol. 152] 4. The Court erred in not dismissing the bill of complaint on the ground that the suit is in reality against the State of New York and with respect to property in its possession, and that the State has not given its consent to be sued.

5. The Court erred in holding that this action is not essentially an action for ejectment.

6. The Court erred in not dismissing the bill of complaint on the ground that it fails to show any ground of equitable jurisdiction.

7. The Court erred in denying the motion of the defendants and appellants to dismiss the bill of complaint on the ground that the said bill of complaint does not state facts sufficient to constitute a cause of action in equity against these defendants.

8. The Court erred in holding that the provisions of Section 761 of the New York Conservation Law (Ch. 242, Laws of 1928), if so construed as to vest in the Board of Commissioners of the Palisades Interstate Park power to acquire lands by entry and appropriation in the manner provided for by Section 59 of the New York Conservation Law, in the absence of funds separately appropriated by the Legislature of the State of New York in such an amount as to be reasonably certain to cover any award which may reasonably be made for said lands, is invalid as violative of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

9. The Court erred in holding that the provisions of Section 761 of the New York Conservation Law (Ch. 242, Laws of 1928), if so construed as to vest in the Board of Com- [fol. 153] missioners of the Palisades Interstate Park power to acquire lands by entry and appropriation in the manner provided for by Section 59 of the New York Conservation Law, in the absence of funds separately appropriated by the Legislature of the State of New York in such an amount as to be reasonably certain to cover any award which may reasonably be made for said lands, is invalid as violative of Section 6 of Article I of the Constitution of the State of New York.

10. The Court erred in holding that the provisions of Section 761 of the New York Conservation Law (Ch. 242, Laws of 1928), if so construed as to vest in the Board of Commissioners of the Palisades Interstate Park power to acquire lands by entry and appropriation in the manner provided for by Section 59 of the New York Conservation Law, in the absence of funds separately appropriated by the Legislature of the State of New York in such an amount as to be reasonably certain to cover any award which may reasonably be made for said lands, is invalid as violative of Section 4 of Article VII of the Constitution of the State of New York.

11. The Court erred in holding that Section 59 of the New York Conservation Law violates constitutional rights.

12. The Court erred in holding that the taking of property pursuant to Sections 59 and 761 of the New York Conservation Law is illegal and void, as violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

13. The Court erred in holding that at the time of the entry [fol. 154] upon and appropriation of plaintiffs' property there were no funds in the State Treasury out of which a judgment recovered by the plaintiffs in the Court of Claims could be lawfully satisfied.

14. The Court erred in holding that there never was an appropriation of money for the acquis-tion of lands by en-

try and appropriation by the Board of Commissioners of the Palisades Interstate Park.

15. The Court erred in holding that Section 761 of the New York Conservation Law (Ch. 242, Laws of 1928) was in conflict with the provisions of Chapter 602 of the Laws of 1924.

16. The Court erred in holding that Section 761 of the New York Conservation Law (Ch. 242, Laws of 1928) was inconsistent with prior legislation and contrary to the vote of the people approving Chapter 602, Laws of 1924, in that it purported to vest the Commissioners of the Palisades Interstate Park with the power to acquire land by entry and appropriation with money derived from the bond issue authorized by Chapter 602, Laws of 1924 and appropriated for the use of the Commissioners of the Palisades Interstate Park by Chapter 16, Laws of 1926.

17. The Court erred in holding that by reason of the provisions of Article VII, Section 4 of the New York Constitution, monies derived from the bond issue authorized by Chapter 602 of the Laws of 1924, approved by the People, could not be lawfully appropriated to pay for lands taken by the Palisades Park Commission by entry and appropriation in accordance with the provisions of Sections 59 and 761 of the New York Conservation Law.

[fol. 155] 18. The Court erred in holding that by reason of the requirements of Article III, Section 21 of the Constitution of the State of New York, the money appropriated by Chapter 16 of the Laws of 1926 for the use of the Board of Commissioners of the Palisades Interstate Park was not validly reappropriated by Chapter 75 of the Laws of 1928.

19. The Court erred in holding that the obligation of the State or the amount payable out of the State Treasury upon an award by the Court of Claims is in any way limited by the allocation of monies to the Palisades Interstate Park Commission made or on about September 29, 1928, or by the amount of said allocation.

20. The Court erred in holding that the compensation that plaintiffs can recover in the Court of Claims is limited to some part of the sum of $600,000 allocated to the Pal-

isades Interstate Park Commission on or about September 29, 1928, and erred in holding that the compensation recoverable by the plaintiffs is limited by the said allocation in any way.

21. The Court erred in holding that Article III, Section 21 of the Constitution of the State of New York imposes any limitation upon the duty or the power of the Legislature to make an appropriation for the payment of an award rendered by the Court of Claims of the State.

22. The Court erred in holding that the taking of land for public park purposes in accordance with the provisions of Section 59 and Section 761 of the New York Conservation Law does not pledge the credit of the State of New York for the payment of just compensation to the owner of such land, except to the amount of funds in the State [fol. 156] Treasury previously appropriated and available to pay for such land at the time of the entry and appropriation.

23. The Court erred in holding that an award of the Court of Claims of the State of New York without an appropriation creates no right to payment out of the Treasury of the State.

24. The Court erred in holding that there is not a sufficient pledge of the general credit of the State by reason of the provision of Sub-division 7 of Section 59 of the New York Conservation Law that the amount of the judgment recovered in the Court of Claims by the owner of land taken by entry and appropriation shall be paid out of the State Treasury.

25. The Court erred in holding that plaintiffs are without remedy for the recovery of the value of the land appropriated and in holding that there is no impartial tribunal where plaintiffs' claim for such value can be determined.

26. The Court erred in holding that plaintiffs have any standing to challenge the availability, for the payment of awards rendered by the Court of Claims for lands taken by entry and appropriation under Sections 59 and 761 of the Conservation Law, of money appropriated to the use of the Palisades Interstate Park Commission by Chapter

16 of the Laws of 1926, and reappropriated by Chapter 75 of the Laws of 1928.

27. The Court erred in holding that plaintiffs have any standing to attack the validity of the reappropriation for the State Park System, including the Palisades Interstate [fol. 157] Park, made by Chapter 75 of the Laws of 1928.

28. The Court erred in holding that the entry upon and appropriation of plaintiffs' land in accordance with the provisions of Sections 59 and 761 of the New York Conservation Law was invalid, and did not operate to divest the plaintiffs of title to the said property, and did not operate to vest title in the People of the State.

29. The Court erred in holding that, in the absence of a separate appropriation by the New York Legislature in such an amount as to be reasonably certain to cover any award that may be reasonably made to plaintiffs in the Court of Claims, the entry upon and appropriation of plaintiffs' property was invalid.

30. The Court erred in holding that the appropriation of plaintiffs' property was invalid under the due process clause of the Fourteenth Amendment of the Constitution of the United States and in holding that it was invalid under Article I, Section 6 of the Constitution of the State of New York, and in holding that it was invalid under Article VII, Section 4 of the Constitution of the State of New York, and in holding that the said property did not, pursuant to the entry and appropriation proceedings, become the property of the People of the State of New York.

31. The Court erred in holding, in advance of the final hearing and determination of this action, that the fair value in eminent domain of the property appropriated was in excess of $500,000.

32. The Court erred in holding that it is asserted by the Sparkill Realty Corporation that its income, by reason of its lease to the Standard Trap Rock Corporation, was [fol. 158] approximately $80,000 annually.

33. The Court erred in granting a temporary injunction in the absence of a showing that the Palisades Park Commission was without funds outside of money derived from

the bond issue authorized by Chapter 602 of the Laws of 1924, and in the face of uncontradicted proof that the said Commission had monies, securities and other properties of a value of not less than one-half a million dollars, outside of the bond monies, available for use in the acquisition of lands for park purposes.

34. The Court erred in enjoining the defendants from continuing in possession of the property in suit, pending the final hearing and determination of this cause.

35. The Court erred in enjoining defendants, pending the final hearing and determination of this cause, from doing any acts or things which might interfere with the ownership or possession by the plaintiffs of the aforesaid property or with the free use and enjoyment thereof by the plaintiffs.

36. The Court erred in failing to maintain the status quo pending the final hearing and determination of this cause.

37. The Court erred in granting pendente lite the final relief demanded by the bill of complaint.

38. The Court erred in granting the decree of interlocutory injunction.

Wherefore said defendants-appellants pray that the said [fol. 159] decree be reversed and the cause remanded, and for such other and further relief in the premises as may be in accordance with law.

Dated New York, July 22, 1929.

Engelhard, Pollak, Pitcher & Stern, Solicitors for Defendants White, Hopkins, Partridge, Perkins, Sutro, Smith, Childs, Harriman, Baker, and Osborn, sued as constituting the Board of Commissioners of the Palisades Interstate Park. James Gibson, Second Asst. Attorney General, Solicitor for Hamilton Ward, Attorney General, and Alexander MacDonald, Conservation Commissioner.

[fol. 160] Bond on appeal for $500.00, approved July 22, 1929, omitted in printing.

[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the foregoing are true and correct copies of all the papers upon which the Court acted in making the order appealed from herein and the whole thereof, now on file in the office of the Clerk of the District Court of the Southern District of New York, said papers being the following:

1. Citation on Appeal and Affidavits of Service.
2. Order to Show Cause on Application for Interlocutory Injunction.
3. Bill of Complaint, and Exhibits.
4. Affidavits submitted in support of application for Interlocutory Injunction.
   a. Affidavit of James G. Shaw.
   b. Affidavit of Ellis C. Soper.
   c. Affidavit of Frank T. Gucker.
   d. Affidavit of Arthur S. Lane.
   e. Affidavit of William E. Keine.

[fol. 162] f. Affidavit of Edward W. Christie.

   g. Affidavit of Jackson A. Dykman.
5. Affidavits submitted in opposition to application for interlocutory injunction.
   a. Affidavit of J. Du Pratt White and Exhibits.
   b. Affidavit of Frederick C. Sutro.
   c. Supplementary Affidavit of J. Du Pratt White.
6. Motion of defendants J. Du Pratt White, et al., to dismiss Bill of Complaint.
7. Motion of defendants, Hamilton Ward and Alexander MacDonald to dismiss Bill of Complaint.
8. Order granting interlocutory injunction and denying motion to dismiss.
9. Opinion, Manton, C. J., Goddard, D. J., Bryant, D. J.
10. Petition for appeal and order allowing appeal.
11. Assignment of Errors and prayer for reversal.

12. Bond on appeal.

Dated New York, August 19, 1929.

Henry J. Hemmens, Solicitors for Plaintiff Sparkill Realty Corporation. Cullen & Dykman, by Jackson A. Dykman, Solicitors for Plaintiff Standard Trap Rock Corporation. Engelhard, Pollak, Pitcher & Stern, Solicitors for Defendants White, Hopkins, Partridge, Perkins, Sutro, Smith, Childs, Harriman, Baker and Osborn, sued as constituting the Board of Commissioners of Palisades Interstate Park. James Gibson, Solicitor for Defendants Ward and MacDonald.

[fol. 163] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated New York, August 19, 1929.

Henry J. Hemmens, Solicitors for Plaintiff Sparkill Realty Corporation. Cullen & Dykman, by Jackson A. Dykman, Solicitors for Plaintiff Standard Trap Rock Corporation. Engelhard, Pollak, Pitcher & Stern, Solicitors for Defendants White, Hopkins, Partridge, Perkins, Sutro, Smith, Childs, Harriman, Baker and Osborn, sued as constituting the Board of Commissioners of Palisades Interstate Park. James Gibson, Solicitor for Defendants Ward and MacDonald.

[fol. 164] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 165] Supreme Court of the United States

Statement of Points to be Relied upon and Designation of the Parts of the Record to be Printed—Filed Aug. 21, 1929

Appellants hereby adopt their assignment of errors, (appearing at page 151 of the record herein) as their statement

of points to be relied upon, and represent that the whole of the record as set forth in the stipulation herein, and as filed, is necessary for the consideration of the case, as required by Paragraph 9 of Rule 13 of the rules of the Su-
[fols. 166 & 167] preme Court of the United States.

Dated New York, August 16th, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker, and Frederick H. Osborn, Constituting the Board of Commissioners of the Palisades Interstate Park; Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, Appellants. Walter H. Pollak, Counsel for Appellants. Engelhard, Pollak, Pitcher & Stern, Solicitors for Appellants J. Du Pratt White et al. James Gibson, Second Assistant Attorney General of the State of New York, Solicitor for Appellants Ward and MacDonald.

Service of the foregoing is acknowledged on the 19″ day of August, 1929.

The foregoing comprehending the entire record, Appellees hereby waive additions to the record, and consider necessary for the consideration of the case printing the entire record as above represented by Appellants.

Cullen & Dykman, by Jackson A. Dykman, Solicitors for Appellee Standard Trap Rock Corporation. Henry J. Hemmens, Solicitor for Appellee Sparkill Realty Corporation.

[fol. 168] [File endorsement omitted.]

Endorsed on cover: File No. 34,467. S. New York D. C. U. S. Term No. 336. J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, et al., appellants, vs. Sparkill Realty Corporation and Standard Trap Rock Corporation. Filed August 21st, 1929. File No. 34,467.

FILE COPY

OCT 3 1929

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

GALLO & ACKERMAN, Inc., 142 Liberty Street, 'Phone—Rector 7257-8.

Supreme Court of the United States

OCTOBER TERM, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander Macdonald, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

Sparkill Realty Corporation and Standard Trap Rock Corporation,

Appellees.

Sirs:

PLEASE TAKE NOTICE that on the 7th day of October, 1929, or as soon thereafter as counsel can be heard, the within motion to advance will be submitted to the Supreme Court of the United States.

Dated, New York, September 20, 1929.

Yours, etc.,

WALTER H. POLLAK,
Counsel for Appellants.

To

Cullen & Dykman, Esqs.,
Counsel for Appellees,
177 Montague Street,
Brooklyn, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK. (THREE JUDGES CONVENED PURSUANT TO SECTION 266 OF THE JUDICIAL CODE.)

MOTION TO ADVANCE.

Come now appellants, the Attorney General of the State of New York, the Commissioner of the Conserva-

tion Department of the State of New York, and the members of the Board of Commissioners of the Palisades Interstate Park, and move that this cause be advanced for early hearing.

This is an appeal from an interlocutory injunction issued by the District Court for the Southern District of New York (three judges sitting, pursuant to Section 266 of the Judicial Code).

The Board of Commissioners of the Palisades Interstate Park (whose members are jointly appointed by the governors of the states of New York and New Jersey) was created a body politic by Chapter 170 of the New York Laws of 1900 and empowered to select and take by eminent domain such lands along that part of the west bank of the Hudson River known as Palisades as "may in their opinion be proper and necessary to be preserved for the purpose of establishing a State Park and thereby preserving the scenic beauty of the Palisades" (Secs. 4, 5, Ch. 170, L. 1900). In 1928 by amendment of the New York Conservation Law (Ch. 242, L. 1928, in effect March 5, 1928) Chapter 170 of the Laws of 1900 was repealed and its provisions re-enacted with certain changes, as part of the Conservation Law. The original territorial limits of the Commissioners' power of eminent domain have been extended by amendment of the creating statute and also by the Conservation Law of 1928.

Since its inception, the Board of Commissioners has deemed that it was under a mandate to prevent, so far as lay within its power and jurisdiction, the slopes along the west bank of the Hudson River from being defaced by quarrying.

Under the original creating statute, and until its repeal and re-enactment in the Conservation Law of 1928, the Board was required to exercise its power of eminent domain by condemnation proceedings (Secs. 6-16 of Ch. 170, L. 1900) and could not acquire title to, or enter into

possession of, any property taken by it for park purposes until the value of the property as fixed by appraisal had been paid to the owner (Sec. 16 of Ch. 170, L. 1900).

Section 761 of the amended Conservation Law of 1928 gave to the Board of Commissioners of the Palisades Interstate Park "the power to acquire lands by entry and appropriation in the manner provided for in Section 59 of the Conservation Law." This section provides that the Conservation Department may, with the approval of the Governor, acquire lands for park purposes by filing in the office of the Secretary of State of New York a description of the property to be taken, with a notice endorsed thereon that the described property is appropriated by the People of the State of New York for park purposes, and serving upon the owner of the lands in question a duplicate of this description and notice. Upon such service the state immediately takes title to the property (L. 1928, Ch. 242, Sec. 59, Subd. 3) and in lieu thereof the owner acquires a right to sue for compensation in the New York Court of Claims and to have the amount of his judgment paid out of the State Treasury (L. 1928, Ch. 242, Sec. 59, Subd. 7).

Prior to October 11, 1928, appellee, Sparkill Realty Corporation, owned certain land within the region where the Commissioners of the Palisades Interstate Park were empowered to take land by eminent domain for park purposes. This property (which lies within the Southern District of New York) consists of Tallman Mountain, a conspicuous wooded hill on the west bank of the Hudson at the north end of the Palisades, together with adjacent meadow land between the hill and the river. Sparkill Realty Corporation had in 1927 leased this property to appellee Standard Trap Rock Corporation for twenty years, with a renewal privilege of twenty years, for quarrying purposes. The Standard Trap Rock Corpora-

tion had made extensive preparations for the commencement of its quarrying operations and in October, 1928, was about to begin excavation which would necessarily remove the trees, shubbery and surface soil and make permanent alteration in the appearance of the hill.

Accordingly, the Board of Commissioners of the Palisades Interstate Park on October 9, 1928, resolved to take this land by entry and appropriation in the manner provided by Section 59 of the New York Conservation Law (Record, tr. pp. 64-72, or. pp. 94-106); on the following day the approval of the Governor and the Conservation Commissioner was given (Record, tr. pp. 72, 73, or. pp. 106, 109). On October 11, 1928, the description of the property, endorsed with notice of appropriation, was filed in the office of the Secretary of State of New York and a duplicate copy thereof served upon the appellees (Record, tr. pp. 74-5, or. pp. 111-12). Thereupon, the Board of Commissioners of the Palisades Interstate Park entered upon the property and remained in possession until ousted by the interlocutory injunction appealed from.

On March 19, 1929, this suit was begun by the service of a bill of complaint and an order to show cause why an interlocutory injunction should not be granted (Record, tr. pp. 1-19, or. pp. 6-31). The Attorney General and Conservation Commissioner of New York were joined as defendants by virtue of Section 68 of the Executive Law and Section 9 of the Conservation Law. The bill of complaint attacked the validity of the appropriation of plaintiffs' property, alleging that Section 4 of Article VII of the New York Constitution "forbids the creation of State debts save to meet casual deficits or for State defense unless authorized by statute submitted and approved by the People at a general election and only in accordance with such statute so approved"; that Chapter 602 of the Laws of 1924 which provided for the issue of State bonds to the amount

of $15,000,000 for the development, improvement and extension of the State park system and was approved by the People at the general election held in November, 1924, allocated $3,500,000 for the Palisades Interstate Park, but that this referendum act provided that such moneys should be expended and lands acquired by the Commissioners of the Palisades Interstate Park under the "provisions of Chapter 170 of the Laws of 1900 as amended" (Record, tr. p. 7, or. p. 14); that Chapter 170 of the Laws of 1900 contained no provision for the acquisition of lands by entry and appropriation, and was wholly repealed by Chapter 242 of the Laws of 1928 which authorized the Commissioners of the Palisades Interstate Park to take land by entry and appropriation; that an allocation of the sum of $500,000 derived from the bond issue for the acquisition of plaintiffs' property, made on or about September 29, 1928, was therefore void and of no effect, and that "no sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (Record, tr. p. 7, or. p. 14).

The complaint further alleges that the appropriation of $3,500,000 allocated to the Palisades Interstate Park by the Referendum Act, and approprriated for the Palisades Interstate Park in accordance therewith by Chapter 16 of the Laws of 1926, has lapsed for lack of a valid reappropriation, in that the law purporting to reappropriate said sum (Ch. 75, Part 5, L. 1928) fails to comply with the requirements of Section 21, Article III of the New York Constitution by failing to specify the object to which the sum appropriated is to be applied (Record, tr. p. 8, or. p. 15).

The bill of complaint prays that the description and notice relating to plaintiffs' property and the acts of the defendants thereunder be adjudged invalid as violative of Section 1, Article XIV of the Articles in addition to and amendment of the Constitution of the United States

of America and of Section 6 of Article I and Section 4 of Article VII of the Constitution of the State of New York; further, that it be adjudged that Chapter 75, Part 5, of the Laws of 1928, in so far as it relates to the "State Park system" and the reappropriation of $11,912,850.58, is invalid as violative of the provisions of Section 21, Article III, of the Constitution of the State of New York, and that the defendants be enjoined from enforcing the provisions of Chapter 242 of the Laws of 1928 with respect to plaintiffs' property and from continuing in possession thereof (Record, tr. pp. 9-10, or. pp. 16-17).

On June 7, 1929, the three judges of the District Court rendered an opinion sustaining these contentions (Record, tr. pp. 86-97, or. pp. 131-148), and on June 21, 1929, entered an order denying appellants' motions to dismiss (for lack of jurisdiction and failure to state a cause of action and lack of equity) and granting appellees' application for interlocutory injunction. The order recites (Record, tr. p. 82, or. pp. 125-6) that the Court is

> "of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section 6, Article I and Section 4, Article VII of the Constitution of the State of New

> York, and that no appropriation of funds has been made by the said legislature for said purpose",

and provides (Record, tr. pp. 82-3, or. p. 126) that

> "Pending final decree in this action and until the further order of this Court the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of Chapter 242 of the Laws of 1928 of the State of New York or a certain notice, description or certificate of defendants, Board of Commissioners of the Palisades Interstate Park, dated October 11, 1928, with reference to the property hereinafter described be and hereby are enjoined and restrained, jointly and severally, from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs by entry and appropriation as aforesaid or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for non-compliance by plaintiffs with said act, notice, description or certificate or from continuing in possession of plaintiffs' said property".

The interlocutory injunction has thus restored the possession of the premises to the appellees, and Standard Trap Rock Corporation since retaking possession has applied to the Department of War of the United States for permission to erect a dock and causeway one-half mile in length from the property in question into the Hudson River.

Appellants' petition for appeal was allowed by Hon. Martin T. Manton, Circuit Judge, on July 22, 1929; on the same day the bond on appeal was approved and filed and appellees' assignments of error were duly filed. The record in this court was filed and docketed on August 21, and has been printed. The jurisdictional statement required by Rule 12 was filed on September 19.

On appeal, appellants will, as appears by the statement of points filed in this court on August 21, urge that the District Court erred in the various particulars enumerated in appellants' assignments of error.

Advancement of this case is asked on the following grounds:

1. Substantial delay in the determination of this appeal will be almost as prejudicial to the interests of the People of the State of New York as a final decree in appellees' favor would be. Appellees, by the interlocutory injunction, have been given possession and secured the "free use and enjoyment" of the property. They are thus left free to adapt it to their commercial purposes, and in so doing to destroy the scenic beauty and historic condition of the region, the preservation of which is one of the primary objects of appellants' taking the land as a park. A speedy hearing and determination of the appeal is therefore essential for the preservation of this park for the people in the event that the interlocutory injunction is reversed.

2. Since the enactment of the Adirondacks Park Act in 1897, entry and appropriation has become the method employed by the Conservation Department of the State of New York (and its predecessors) for the acquisition of lands for park purposes, to the virtual exclusion of the alternate method of condemnation. The opinion of the District Court and its interlocutory injunction order declare that this method violates the constitutional re-

quirements of due process unless before the entry and appropriation, funds have been "*separately* appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award that may reasonably be made for such lands." No such stringent requirement exists in any of the New York statutes which provide for the use of this method of exercising the right of eminent domain for park purposes (see L. 1928, Ch. 242—Sec. 50, Subd. 2; Sec. 694; Sec. 717, Subds. 4 and 8; Sec. 727, Subd. 2; Sec. 737, Subd. 1; Sec. 777, Subds. 1, 6 and 8; Sec. 786).

The doubt thus cast by this decision upon the constitutional validity of this method as customarily exercised in New York must virtually suspend the use of this method by the Conservation Department and the various park commissions under it until this appeal is determined.

3. The opinion of the District Court and its decree declare the re-appropriation for the Palisades Interstate Park fund contained in Part 5 of Chapter 75 of the Laws of 1928 to be invalid under Section 21, Article III of the New York Constitution, because there is no statement in the re-appropriation act of the use to which the funds re-appropriated are to be applied. If this ruling be correct, the re-appropriation of $11,912,850.58 for the state park system fund is likewise invalid and other re-appropriations affecting other state funds—the World War Bonus Fund and the State Institutions Building Fund—are likewise invalid (see Laws 1928, p. 224). Uncertainty as to the legal availability of the re-appropriated funds thus embarrasses the State's whole program of park development and other State agencies as well, so long as this appeal is pending.

For all these reasons the public interest will be subserved by the advancement of this cause.

WHEREFORE, appellants pray that this case be advanced upon the calendar and assigned for hearing at an early date.

Dated, September 20, 1929.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

ENGELHARD, POLLAK, PITCHER & STERN,
Solicitors for Appellants,
J. Du Pratt White, et al.

JAMES GIBSON,
Second Assistant Attorney General
of New York,
Solicitor for Appellants,
Hamilton Ward and
Alexander MacDonald, etc.

FILE COPY

FILED
SEP 19 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF JURISDICTION.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

GALLO & ACKERMAN, Inc., 142 Liberty Street, 'Phones—Rector 7257–8.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander Macdonald, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

Sparkill Realty Corporation and Standard Trap Rock Corporation,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York. (Three Judges Convened Pursuant to Section 266 of the Judicial Code.)

STATEMENT OF JURISDICTION.

This is an appeal by all of the defendants above named from an interlocutory injunction issued by the District Court for the Southern District of New York on June 12, 1929 (Record, or. pp. 125-129), the application therefor having been heard and granted by a court of three

judges convened pursuant to Section 266 of the Judicial Code, consisting of Honorable Martin T. Manton, Circuit Judge for the Second Judicial Circuit, and Honorable Henry W. Goddard and Honorable Frederick H. Bryant, District Judges.

The order appealed from recited (Record, or. pp. 125-6) that the Court was

> "of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section 6, Article I and Section 4, Article VII of the Constitution of the State of New York, and that no appropriation of funds has been made by the said legislature for said purpose",

and enjoined the defendants, pending final decree, from acting under or by virtue of Chapter 242 of the Laws of 1928 of the State of New York, or under or by virtue of a certain notice of the Board of Commissioners of Palisades Interstate Park, dated October 11, 1928, with reference to certain property described in the decree, and from in any way enforcing or attempting to enforce the provisions of the said act or notice with respect to the said property, and from continuing in possession of the said property (Record, or. p. 126).

The appellate jurisdiction of this Court is derived from Section 266 of the Judicial Code (36 Stat. 1162; as amended by act of March 4, 1913, c. 160, 37 Stat. 1013 and by act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. A. Tit. 28, Sec. 380), which gives the right of direct appeal to this Court from an order granting or denying an interlocutory injunction in such case (*Williams* vs. *Standard Oil Co.*, 278 U. S., 235; *Cavanaugh* vs. *Looney*, 248 U. S., 453; *Clark* vs. *Poor*, 274 U. S., 554, 556).

Proceedings in this suit were begun by service of an order to show cause why an interlocutory injunction should not be granted, dated March 19, 1929 (Record, or. p. 6), and a bill of complaint (Record, or. p. 9). The purpose of the suit, as shown by the bill of complaint, is to restrain continued occupation of the aforesaid real property, which is located within the Southern District of New York on that part of the west bank of the Hudson River, known as the Palisades. On October 11, 1928, the appellants, constituting the Board of Commissioners of the Palisades Interstate Park, after resolution duly made by them, and with the approval of the Honorable Alfred E. Smith, Governor of the State of New York, had, in the manner provided by Sections 59 and 761 of the New York Conservation Law (Chapter 242 of the Laws of 1928), filed in the office of the Secretary of State of the State of New York a description of said property, upon which was endorsed a notice that the property had been appropriated, with the approval of the Governor, by the People of the State of New York for public and state park purposes, and on the same day serving upon the appellees—Sparkill Realty Corporation being then owner, and Standard Trap Rock Corporation being then lessee for the purpose of quarrying—notice of these proceedings (Record, or. pp. 94-112), this being the notice referred to in the order appealed from.

Thereupon on or about October 11, 1928, the appellants constituting the Board of Commissioners of the Palisades Interstate Park entered upon the said real property and continued in possession thereof until the service upon them of the order herein appealed from (Record, or. p. 91).

The bill of complaint alleged that no sum whatever has been appropriated by the State Legislature for the acquisition of plaintiffs' property by entry and appropriation (Record, or. p. 14) and prayed that part 9, Chapter 242 of the Laws of 1928 of the State of New York, and the above mentioned notice of the defendants constituting the Board of Commissioners of the Palisades Interstate Park Commission, dated October 11, 1928, and the acts of the defendants thereunder, with respect to plaintiffs' property, be adjudged "invalid as violative of the provisions of Section 10 of Article I of the Constitution of the United States of America and of Section 1, Article XIV, of the Articles in addition to, and amendment of the Constitution of the United States of America and of Section 6 of Article I and Section 4 of Article VII of the Constitution of the State of New York," and that the defendants be enjoined from continuing in possession of the said property (Record, or. pp. 16-17).

Leave to appeal was prayed for and allowed on July 22, 1929 (Record, or. p. 149), and the appeal has been duly perfected.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants.

The right to file a statement opposing the jurisdiction is hereby waived.

JACKSON A. DYKMAN,
Counsel for Appellees.

FILE COPY

FILE
DEC 28
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

WALTER H. POLLAK,
JAMES GIBSON,
Second Assistant Attorney General of New York,
Counsel for Appellants.

WALTER H. POLLAK,
CARL S. STERN,
RUTH I. WILSON,
on the Brief.

GALLO & ACKERMAN, Inc., 147 Liberty Street, 'Phones—Hitchcock 8078-9.

TABLE OF CONTENTS.

PAGE

Opinion below 1
Jurisdiction 2
Statement of facts 3

Duties and powers of Palisades Interstate Park Commission 3
The entry and appropriation 6
Funds available for compensation 8
N. Y. Constitutional provisions concerning appropriation of State funds 11
Proceedings in the District Court 12
Bill of complaint 12
Application for interlocutory judgment 14
Appellees' affidavits 14
Appellants' affidavits 15
Decree 16

Specification of errors 17
Outline of argument 17

The Argument:

I. That the pledge of the general credit of the State assures just compensation and satisfies the constitutional requirement of due process has been decided so often by this Court that a contention to the contrary does not raise a substantial federal question 19

Absence of antecedent appropriation the premise of the supposed Federal question 19
Pledge of credit of the State by Conservation Law, Section 59 20

PAGE

Decisions of this Court establishing the sufficiency of this pledge 21

Sweet vs. Rechel 21
Backus vs. Fort Street Union Depot Co. 22
Adirondack Railway Co. vs. New York 23
Williams vs. Parker 24
Crozier vs. Krupp 26
Hays vs. Port of Seattle 29
Joslin Co. vs. Providence 31
Pauchogue Land Corp. vs. Long Island State Park Commission 31

The Federal question must be substantial 33
A question long settled by this Court is not substantial 33

II. Every provision of the New York Constitution and statutes that the Court below took as a reason for rejecting the principle settled by this Court, is in reality but an additional reason requiring the application of that principle 34

No antecedent appropriation can assure payment: all appropriations lapse in two years 34
Full compensation, only the pledge of the State's credit can assure 35
New York Constitution, Article III, Section 21, imposes no limitation upon Legislature's power to appropriate funds 36
Allocation by administrative officers no limitation upon Court of Claims or Legislature 37
Conservation Law, Section 50 without application to Palisades Park Commission 40

PAGE

No pledge of the State's credit in Rockaway Pacific Corporation vs. Stotesbury and the case without application 43

Presumption that the State will meet its obligations 45

III. Appellees' objections to being compensated out of moneys authorized by the people in 1924, appropriated by the Legislature in 1926 and reappropriated in 1928, are without color of merit. It cannot be assumed that the New York Courts would sustain them and they cannot be made to serve as a basis for the jurisdiction of the Federal Courts 49

Supposed Federal question is based on assumption that appellees are right on two preliminary questions of state law 49

Appellees obviously wrong in their construction of "as amended" 49

1928 Conservation Law re-enacts Palisades Park Act: the rule of construction 50

Amendment includes addition 51

"As amended" includes future amendments 52

Appellees' criticism of the 1928 reappropriation is obviously mistaken 54

The object of the reappropriation is clearly specified 55

The criticism of the reappropriation is trivial 56

Article VII, Section 4 of the New York Constitution prevents use of State Park System fund for any other purpose 56

Federal Courts should not decide preliminary questions of state law so as to create a question under the Federal Constitution 57

PAGE

IV. Appellees are not injured by having their compensation paid out of funds derived from the bond issue of 1924. They are therefore without standing to raise the questions of New York law on which they predicate their so-called Federal question 58

V. The bill of complaint does not even allege the facts necessary to present the unsubstantial question of due process upon which jurisdiction was invoked. It fails to show that the funds available for appellees' compensation at the time of the entry and appropriation were even upon appellees' own theory inadequate. Nor does it show any obstacle to the use of moneys derived from the bond issue of 1924 other than appellees' own objections 59

Fair value of property not shown 60
Inadequacy of appropriation not shown 62
Use of bond moneys questioned, not by State officials, only by appellees themselves 63
Jurisdiction of the Federal Courts cannot be based upon a question purely hypothetical .. 65

VI. Injunction is not the remedy to recover the possession of real property. It follows that the bill is without equity and the case therefore beyond the jurisdiction of the Statutory Court, and further that the case is outside the jurisdiction of the Federal Courts altogether. For a plaintiff's case in ejectment can present no federal question 66

Appellees out of possession, appellants in possession, when suit brought 66

PAGE

Injunction not the remedy to recover possession 66
Inadequacy of legal remedy not shown 68

Alleged invalidity of State statute no part of a plaintiff's case in ejectment 69

VII. The considerations already advanced show that the bill is, on its face, without merit and should on that ground too have been dismissed 71

VIII. The decisions of a century certify the sufficiency of Conservation Law, Section 59 under the due process and just compensation clause of the New York Constitution, and the Statutory Court manifestly erred in holding to the contrary 72

People vs. Adirondack Ry. Co. 72
Pauchogue Land Corp. vs. L. I. Park Comm. 73
Decisions of Kent, C. 74
Sage vs. Brooklyn 74

IX. The interlocutory decree is not confined to preserving the status quo. It gives appellees all the relief that a final decree in their favor could give 76

Drastic terms of interlocutory decree 76
True purpose of interlocutory injunction is to preserve the status quo 77
Interlocutory decree should not give final relief..... 77
The abuse of discretion: Cavanaugh vs. Looney ... 78

PAGE

Conclusion: The Statutory Court ruled that the State Legislature must make, in advance of the taking of any piece of real property, a "separate appropriation in such an amount as to be reasonably certain to cover an award which may reasonably be made for said land." The practical result of the decision is to deprive the State of the most used and most efficient method of exercising its power of eminent domain 80

APPENDIX

(in separate pamphlet)

Judicial Code, Section 266 1

New York Constitution:
- Article I, Section 6 3
- Article I, Section 7 3
- Article III, Section 19 4
- Article III, Section 21 4
- Article VII, Section 4 5

Palisades Interstate Park Act of 1900 7

Ch. 242 of the Laws of 1928:
- Section 1 21
- Section 5 21
- Section 41 27
- Section 50 35
- Section 51 35

PAGE

New York Conservation Law of 1928:
- Section 50 22
- Section 59 23
- Section 662 27
- Section 745 28
- Section 746 28
- Section 747 29
- Section 748 30
- Sections 749-759 33
- Section 760 34
- Section 761 34

1924 Bond Referendum Act 36
1926 Appropriation Act 41
1928 Appropriation Act, Part V, Section 5 53

General Construction Law:
- Section 80 54
- Section 95 54

Court of Claims Act:
- Section 1 55
- Section 2 55
- Section 10 56
- Section 11 56
- Section 12 56
- Section 14 57
- Section 17 58
- Section 25 58
- Section 28 60
- Section 28-a 60
- Section 29 61

State Finance Law:
- Section 49-b (former Section 51) 63

TABLE OF CASES.

PAGES

Adirondack Ry. Co. vs. New York State, 176 U. S., 335 ..... 21, 23-24, 24n, 30, 31, 45, 74
American Mercury vs. Kiely, 19 Fed. (2d), 295 77
Arbuckle vs. Blackburn, 191 U. S., 405 59
Arkansas vs. Kansas & Texas Coal Co., etc., 183 U. S., 185 59
Arkansas R. R. Rates, In re, 168 Fed., 720 78

Backus vs. Fort Street Union Depot Co., 169 U. S., 557 ..... 21, 22-23, 23n, 24, 25, 30
Banner Milling Co. vs. State, 240 N. Y., 533; 269 U. S., 582 60
Black vs. Jackson, 177 U. S., 349 66
Board of Excise vs. Curley, 9 Abb. N. C., 100, 69 N. Y., 608 54
Bohmer vs. Haffen, 35 App. Div., 381; 161 N. Y., 390 52
Boston, etc., Mining Co. vs. Montana Ore Co., 188 U. S., 632 66
Bragg vs. Weaver, 251 U. S., 57 ..... 21, 28n, 30, 31
Bridge Co. vs. Union and Northumberland Counties, 232 Pa., 255 46

Cavanaugh vs. Looney, 248 U. S., 453 78-79
Chappell vs. Waterworth, 155 U. S., 102 59
Christian Feigenspan, Inc., vs. Bodine, 264 Fed., 186, aff'd 253 U. S., 350 52
Commissioners of Palisades Interstate Park, Matter of, 164 App. Div., 957 ..... 81n
Commonwealth ex rel. Cummings vs. Attorney General, 13 Pa. Dist., 521 52
County of Albany vs. Hooker, 204 N. Y., 1 63-64
Crozier vs. Krupp, 224 U. S., 290 ..... 21, 26-29, 27n, 28n, 30, 31, 33, 36, 45, 48, 74
Cuyahoga Co. vs. Northern Ohio Co., 252 U. S., 388 33

PAGES

Deere vs. State of New York, 22 Fed. (2d), 851 69
Defiance Water Co. vs. Defiance, 191 U. S., 184 .....19, 65
Denison vs. Keck, 13 Fed. (2d), 384 67
Denver vs. New York Trust Co., 229 U. S., 123 .....71, 78

Equitable Life Assurance Society vs. Brown, 187 U. S., 308 33
Erhardt vs. Boaro, 113 U. S., 527 77
Ex parte Young, 209 U. S., 123 79

Flagg vs. Long Island State Park Commission (Moses), N. Y. L. J., August 3, 1926 79
Flagg vs. Moses, 132 Misc., 494; 225 App. Div., 887; leave to appeal denied, N. Y. Ct. of Appeals, April 23, 1929 .....38-39, 70, 79n, 81n
Florida Central, etc., R. R. Co. vs. Bell, 176 U. S., 321 .....69, 70

Gilchrist vs. Interborough Co., 279 U. S., 159 57
Gold-Washing & Water Co. vs. Keyes, 96 U. S., 199 59
Great Falls Mfg. Co. vs. Attorney General, 124 U. S., 581 46
Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S., 449 19

Hanford vs. Davies, 163 U. S., 273 59
Harriman vs. Northern Securities Co., 197 U. S., 244 71
Harris vs. White, 81 N. Y., 532 53
Hatch vs. Reardon, 204 U. S., 152 ..... 58n
Hays vs. Port of Seattle, 251 U. S., 233.....21, 29-30, 30n, 31, 33, 36, 48
Hopkins vs. Clemson College, 221 U. S., 636 ..... 68n
Hull vs. Burr, 234 U. S., 712 59

Indiana Mfg. Co. vs. Koehne, 188 U. S., 681 68

PAGES

Jerome vs. Ross, 7 Johns. Ch. (N. Y.), 315 ..... 21n, 73, 74
Johnston vs. Corson Gold Mining Co., 157 Fed., 145 67
Joslin Co. vs. Providence, 262 U. S., 668 ..... 21, 28n, 31, 33, 45, 60
Joy vs. City of St. Louis, 201 U. S., 332 69,70

Kahlen vs. State, 223 N. Y., 383 ..... 21n, 73, 74, 82
Kibbee vs. Lyons, 202 App. Div., 562; 235 N. Y., 546 54n

Lacassagne vs. Chapuis, 144 U. S., 119 ..... 66, 67-68
Lancaster vs. Kathleen Oil Co., 241 U. S., 551 68
Lange's Creamery, Inc., vs. City of Niagara Falls, 251 N. Y., 343 58
Lawrence vs. St. Louis-San Francisco Ry. Co., 274 U. S., 588 ..... 77, 78
Levy vs. City of Shreveport, 28 Fed., 209 ..... 57, 65
Louisville, etc., Co. vs. Mottley, 211 U. S., 149 ..... 19, 59, 69

McCain vs. DesMoines, 174 U. S., 168 65
McConihay vs. Wright, 121 U. S., 201 68
Mansfield, etc., Ry. Co. vs. Swan, 111 U. S., 379 19
Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., 485 71
Mayor, Matter of, 99 N. Y., 569 ..... 24, 74
Middletown, Matter of, 82 N. Y., 196 ..... 81n
Merriam Co. vs. Syndicate Publishing Co., 237 U. S., 618 33
Merritt & Chapman Co. vs. U. S., 274 U. S., 611 60
Minnesota vs. Messenger, 27 Minn., 119 46
Mitchell vs. U. S., 267 U. S., 341 60
Mundy vs. Excise Commissioners, 9 Abb. N. C. (N. Y.), 117 54

Newburyport Water Co. vs. Newburyport, 193 U. S., 561 33
Newell vs. People, 7 N. Y., 9 75

PAGES

New Orleans vs. Benjamin, 153 U. S., 411 ..... 57, 65
N. Y. Central R. R. Co. vs. Maloney, 234 N. Y., 208 61

Orleans County Quarry Co. vs. State, 172 App. Div., 863 ..... 61, 61n
Orr vs. Quimby, 54 N. H., 590 46

Panama R. R. Co. vs. Johnson, 264 U. S., 375 54
Pauchogue Land Corporation vs. Long Island State Park Commission, 215 App. Div., 816 ..... 44n, 45n, 46-47, 70
Pauchogue Land Corp. vs. Long Island State Park Commission, 243 N. Y., 15 ..... 21n, 31, 32, 35, 42n, 44n, 45n, 46, 47, 56, 70, 73-74
Pauchogue Land Corporation vs. Long Island State Park Commission, 248 N. Y., 635 ..... 21, 21n, 31, 32, 33, 44n, 70, 81n
Pauchogue Land Corporation vs. Long Island State Park Commission, 278 U. S., 657 ..... 21, 32, 44n, 47-48, 81n
Payne vs. Hook, 7 Wall., 425 68
People vs. Adirondack Ry. Co., 160 N. Y., 225 ..... 21, 21n, 23, 37n, 72-73
People vs. Johnson & Co., 219 App. Div., 285; 245 N. Y., 627; 275 U. S., 571 61
People ex rel. Garvey vs. Prendergast, 148 App. Div., 129 53
People ex rel. Jordan vs. Wotherspoon, 94 Misc., 419; 176 App. Div., 947 ..... 54n
Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531 58

Ramapo Mts. Water, Power & Service Co. vs. Commissioners of Palisades Interstate Park, 177 App. Div., 700 ..... 78, 79
Rasweiler vs. Long Island State Park Commission, N. Y. L. J., April 29, 1927 79

PAGES

Rexford vs. Knight, 15 Barb., 627, 11 N. Y., 308 82
Rockaway Pacific Corp. vs. State of N. Y., 243 N. Y., 556 ..... 30n
Rockaway Pacific Corp. vs. Stotesbury, 255 Fed., 345 ..... 43-44, 44n
Rogers vs. Bradshaw, 20 Johns. (N. Y.), 735 ..... 21n, 37, 46n, 73, 74

St. Joseph & Grand Island Ry. Co. vs. City of Hiawatha, 95 Kan., 471 46
Sage vs. City of Brooklyn, 89 N. Y., 189 74-75
Schieffelin vs. Komfort, 212 N. Y., 520 ..... 58n
Shoemaker vs. U. S., 147 U. S., 282 39-40
Shreveport vs. Cole, 129 U. S., 36 65
Smith vs. Vulcan Iron Works, 165 U. S., 518 71
Southern Ry. Co. vs. King, 217 U. S., 524 ..... 58, 59
Spring Valley Water Co. vs. City & County of San Francisco, 165 Fed., 667 78
State vs. Chadbourne, 74 Me., 506 52
State vs. Dixon, 59 Mont., 58 57
Steamship Co. vs. Joliffe, 2 Wall., 450 51
Stearns vs. Wood, 236 U. S., 75 ..... 58n
Steele vs. Village of River Forest, 141 Ill., 302 54
Sweet vs. Rechel, 159 U. S., 380 ..... 21-22, 23n, 24, 30, 31, 46, 46n, 74

Talbot vs. Hudson, 82 Mass., 417 46
Taylor vs. Anderson, 234 U. S., 74 69
Texas vs. Interstate Commerce Comm'n, 258 U. S., 158 ..... 58n
Trenton vs. New Jersey, 262 U. S., 182 33

United Gas Co. vs. R. R. Commission, 278 U. S., 300 ..... 58n
U. S. vs. Cress, 243 U. S., 316 ..... 28n

PAGES

U. S. vs. Lynah, 188 U. S., 445 ..... 28n
U. S. vs. Wilson, 118 U. S., 86 66
U. S. Fidelity & Guaranty Co. vs. Bray, 225 U. S., 205 71
U. S. Freehold Land Co. vs. Gallegos, 89 Fed., 769 68n

Western Union Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., 239 59
West River Bridge Co. vs. Dix, 47 U. S., 507 ..... 46n, 74
Wheelock vs. Young, 4 Wend. (N. Y.), 647 73
Whitehead vs. Shattuck, 138 U. S., 146 ..... 66, 67
Wick vs. Chelan Electric Co., 50 Sup. Ct. Rep., 41 33
William and Anthony Streets, Matter of, 19 Wend., 678 60
Williams vs. Parker, 188 U. S., 491 ..... 21, 24-26, 30, 31, 33, 48
Williams vs. Riley, 50 Sup. Ct. Rep., 63 ..... 58n
Willing vs. Chicago Auditorium, 277 U. S., 274 ..... 58n
Wright vs. Oakley, 5 Metc. (Mass.), 406 51

Young, Ex parte, 209 U. S., 123 79

TEXTBOOKS.

High, Injunctions [4th ed.] 77
Lewis, Eminent Domain [3rd ed.] 60

CONSTITUTIONAL PROVISIONS AND STATUTES.

Adirondack Park Act 23, 72
Conservation Law (New York) 3, 3n, 4n, 8, 12n, 13, 14, 16, 42, 50, 53, 62, 62n
Section 9 12
Section 50 ..... 40, 41, 42
Section 59 ..... 5, 6, 7, 11, 16, 17, 18, 20, 21, 23, 32, 34, 36, 40, 42, 45, 52, 72, 74, 80
Section 63 ..... 41n
Section 662 10
Section 674 53
Section 747 ..... 3-4, 6, 7
Section 748 53
Section 761 ..... 5, 6, 7, 40, 42, 51-52
Section 777 ..... 32n
Article XVI, Part 9 ..... 3, 42, 50, 66
Article XVI, Part 11 42

Long Island State Park Act, Section 8 ..... 32n, 35
New Jersey Laws, 1900, Ch. 87 3
New York Banking Law, Section 239a 47n
New York Constitution:
Article I, Section 6 ..... 14, 16, 18, 36, 37n, 57, 72
Article I, Section 7 ..... 5n, 37n
Article III, Section 19 ..... 5n, 11, 37
Article III, Section 21 ..... 11, 13, 14, 34, 36, 49, 54-55
Article VII, Section 4 ..... 9, 13, 14, 16, 55, 56, 58

PAGES

New York County Law, Section 12 ..... 47n
New York Court of Claims Act:

Section 14 ..... 5n
Section 25 5
Section 29 ..... 30n, 34

New York Executive Law, Section 68 12
New York General Construction Law, Section 80 ..... 50, 51
New York Income Tax Law 25n
New York Revised Statutes, Section 55 53
New York Session Laws:

L., 1817, Ch. 262 82
L., 1892, Ch. 677 (Statutory Construction Law) 50n
L., 1900, Ch. 170 (Palisades Interstate Park Act) 2-3, 3n, 4n, 9, 13, 14, 50, 53, 54
L., 1905, Ch. 244 (County Law) 47n
L., 1906, Ch. 691 ..... 3n
L., 1909, Ch. 16 (Amend't to County Law) 47n
L., 1909, Ch. 23 (Executive Law) 12n
L., 1909, Ch. 27 (General Construction Law) 50n
L., 1910, Ch. 361 ..... 3n
L., 1911, Ch. 647 (1911 Conservation Law) 5n, 12n
L., 1913, Ch. 442 (Amend't to Executive Law) 12n
L., 1914, Ch. 369 (Banking Law) 47n
L., 1915, Ch. 269 (Amend't to Banking Law) 47n
L., 1916, Ch. 451 ..... 5n
L., 1917, Ch. 13 43
L., 1919, Ch. 627 (Income Tax Law) 25n
L., 1920, Ch. 701 (Amend't to Banking Law) 47n
L., 1920, Ch. 922 (Court of Claims Act) 5n
L., 1924, Ch. 27 ..... 25n
L., 1924, Ch. 602 (Bond Referendum Act) 8, 8n, 9, 9n, 10, 10n, 13, 14, 15, 49, 50, 52, 54n, 55, 56, 57, 58, 59, 63, 64

PAGES

L., 1925, Ch. 196 ..... 25n
L., 1926, Ch. 16 (Appropriation Act of 1926)....9, 9n, 10, 10n, 12, 13, 38n, 49, 50
L., 1926, Ch. 209 ..... 25n
L., 1926, Ch. 769 ..... 56n
L., 1928, Ch. 75, Part V (Appropriation Act of 1928) 9, 12, 13, 14, 49, 54n, 55, 56n, 58, 62n, 63

L., 1928, Ch. 242:
Section 3 ..... 12n
Section 41 ..... 3n
Section 50 ..... 3n

United States Constitution:
Article I, Section 9 36
Article I, Section 10 .....14, 29
Article XIV, Section 1 .....14, 16, 19, 22, 29, 43, 49, 57
United States Dist. Court, Southern Dist., Rules of,
Rule xxx 76n

United States Judicial Code:
Section 24, Subd. 1 19
Section 266 .....2, 14, 42

United States Statutes, 36 Stat., c. 423 .....27n, 28
Washington Constitution, Article VIII, Section 4..... 36
Washington, Laws of,
L., 1913, Ch. 59 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, *Appellants,* against Sparkill Realty Corporation and Standard Trap Rock Corporation, *Appellees.*	No. 336.

On Appeal From the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANTS.

The Opinion Below.

The opinion of the court below has not been reported. It is printed in the record submitted herewith at pages 87-97.

Jurisdiction.

The District Court for the Southern District of New York (three judges convened pursuant to Judicial Code, Section 266) has held void, under the due process clause, a statute of New York which pledges the entire credit of the State to pay for property taken by eminent domain for park purposes, and has granted an interlocutory injunction ousting the Park Commission from a possession enjoyed without disturbance for five months before the suit was commenced. The Commissioners and other officers of the State whom the injunction restrains appeal from this interlocutory decree.

The jurisdiction of this Court under Section 266, as set forth in a separate statement filed in accordance with the Rules, was not contested by appellees, and an application for an early hearing, made by all the parties, was granted (October 28, 1929).

Statement of Facts.

Duties and Powers of Palisades Interstate Park Commission:

The Board of Commissioners of the Palisades Interstate Park was created a body politic by Chapter 170 of the New York Laws of 1900, and by that act empowered

> "to select and locate such lands lying between the top of the steep edge of the Palisades and the exterior of the bulkhead line established by law upon the Hudson river, together with such separate parcels of unimproved lands lying on the front of the top of the Palisades from the New Jersey state line on the south to Piermont creek, near Piermont in Rockland county, on the north, as may in their opinion be proper and necessary to be reserved for the

purpose of establishing a state park and thereby preserving the scenic beauty of the Palisades."[1]

(In the same year New Jersey by similar legislation [N. J. L., 1900, ch. 87] created a corresponding commission in that State. There is no difference in the personnel of the two Commissions, the practice being for the governors of the two states to appoint the same commissioners [R., 57].)

In 1928 the Legislature of New York revised the Conservation Law of that State (N. Y. L., 1928, ch. 242, in effect March 5, 1928). The revising statute re-enacted the provisions of chapter 170 of the Laws of 1900, with certain changes and additions, as Part 9 of the new Conservation Law[2], and repealed the old Palisades Park Act along with the other park statutes consolidated in the revision.[3]

The original territorial limits of the Board of Commissioners' power had been extended by amendments of the creating statute,[4] and were further extended by §747[5] of the Conservation Law of 1928. At the time of the entry and appropriation in question, the area in New York subject to the Commission's power of eminent domain was thus defined:

"The board of commissioners shall continue to have power to and shall from time to time proceed to select and locate such lands from the New Jersey state line on the south to Piermont creek, near Pier-

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[1]N. Y. L., 1900, ch. 170, §4.

[2]N. Y. L., 1928, ch. 242, §41; see Appendix, pp. 27, 28-34.

[3]N. Y. L., 1928, ch. 242, §50; see Appendix, p. 35.

[4]By N. Y. L., 1906, ch. 691, and by L., 1910, ch. 361; see Appendix, pp. 9-10, 7.

[5]Added by N. Y. L., 1928, ch. 242, §41; see Appendix, pp. 27, 29-30.

mont in Rockland county, on the north lying between the highwater line of said river and the top of the steep edge of the palisades, or the crest of the easterly slope of the uplands overlooking said river where the steep palisade rocks are absent or lying on the front of said palisades or uplands, as may in their opinion be proper and necessary to be reserved for the purpose of establishing or extending a state park and thereby preserving the scenic beauty of the palisades and uplands or securing the same to the use of the public for park purposes; and said board of commissioners shall have the further power to, and shall, as soon as said board shall deem it feasible and advisable, proceed to select and locate such mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties, north of Piermont creek and south of the city of Newburgh, and other lands to the west thereof and extending into the Ramapo mountains, except the land comprised in the United States government reservation at West Point and the land comprised in the state reservation at Stony Point, and other lands now owned by the state of New York, as may in the opinion of said board of commissioners, be proper and necessary for the purpose of extending the limits of said state park and thereby preserving the scenic beauty of or securing to the use of the public for park purposes the mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties and other lands to the west thereof and extending into the Ramapo mountains north of the palisades."

From the beginning the Board had had the power of condemnation.[1]

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[1]See Appendix, pp. 13-19.

Section 761 of the 1928 Conservation Law empowered the board to use "in addition" another and more summary method—"to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."[1]

This Section 59 of the Conservation Law (subds. 3, 4, 5, 7)[2] provides that the Conservation Department may, with the approval of the Governor, acquire lands for park purposes by filing in the office of the Secretary of State of New York a description of the property to be taken, with a notice endorsed thereon that the described property is appropriated by the People of the State of New York for park purposes, and by serving upon the owner of the lands a duplicate of this description and notice (subds. 3, 4, 5); upon such service the State's title becomes "complete" (subd. 5) and the owner has the absolute right at any time within two years from the date of the service of the notice to bring an action to recover his compensation in the New York Court of Claims and to have the amount of his judgment, with interest thereon, paid out of the State Treasury (subd. 7; see also New York Court of Claims Act, §25[3]).

Section 59 of the Conservation Law does not require that at the time of the entry and appropriation there shall be funds on hand for the acquisition of the prop-

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[1]See Appendix, p. 34.

[2]See Appendix, pp. 23-26.

[3]N. Y. L., 1920, ch. 922; see Appendix, pp. 55-62.

§14 of this statute analogizes the Court of Claims procedure to that of the Supreme Court of the State.

Article I, Section 7, of the New York Constitution and Article III, Section 19, supply the constitutional basis for the Court of Claims; Article I, Section 7 (Appendix, pp. 3-4), frees the State when appropriating property from the requirement that a jury shall fix the value; Article III, Section 19 (Appendix, p. 4), expressly empowers the Legislature to appropriate money to pay Court of Claims' judgments.

erty, or that funds shall have been appropriated by the legislature for its acquisition; and Section 761 (which gave the Commissioners of the Palisades Interstate Park the right to use the procedure of Section 59) imposes no such requirement.

The entry and appropriation:

The land which is the subject of this suit lies within the Southern District of New York and within the territorial limits of the Commission's power of eminent domain, as defined by the 1928 Conservation Law (R., 4; pp. 3-4, supra).

The property consists of Tallman Mountain, a conspicuous wooded elevation on the west bank of the Hudson at the north end of the Palisades, together with adjacent meadow land between the Mountain and the River (R., 4, 5, 30, 38, 43, 44, 47, 48, 50, 53).

Sparkill Realty Corporation was until the State appropriated on October 11, 1928 the owner of this property, and had in 1927 leased it for quarrying purposes to Standard Trap Rock Corporation for the period of twenty years (R., 4, 5, 11, 12), with a renewal privilege of twenty years (R., 17). Standard Trap Rock Corporation had made extensive preparations for its quarry and at the end of September, 1928, was about to begin actual excavation, which would necessarily involve the destruction of trees, the removal of surface soil and the permanent disfigurement of the cliff (R., 6, 44, 61).

The Palisades Interstate Park Commission, upon which its creating statute had imposed the duty of "preserving the scenic beauty of the Palisades," has from its inception deemed that it was under specific mandate

to prevent, so far as lay within its power and jurisdiction, the defacement of the west bank of the Hudson River by quarries (R., 58).

Negotiations for the purchase of the property failed completely. Appellees demanded at the outset $8,000,000 (R., 60) and never less than $3,000,000 (R., 31, 8) for property assessed at $15,000 (R., 60).

Until Section 747 of the revised Conservation Law, extending the geographical limits of the Commission's jurisdiction became effective on March 5, 1928 (supra, p. 3), there was doubt whether the property was within the Commission's power of eminent domain. And so as matters stood in 1927 the Commission was advised by its counsel (R., 60). In the fall of that year the Commission had to abandon the idea of compulsory acquisition and so notified appellees (R., 75-76). Counsel for the Trap Rock Company requested some amplification of the statement from the Commission's attorney, who declined to give it and explained that he could not predict what the Commission's attitude might be in the future (R., 60).

The appropriation was effected, as we have said, on October 11, 1928, by which time the geographical limits of the Commission's power had been extended, the right of entry and appropriation given to the Commission and large sums made available by the Legislature.

On October 9 the Board resolved to take the land by entry and appropriation (R., 61, 64) in the manner provided by Sections 59 and 761 of the Conservation Law as that year revised; on the following day the Governor and the Conservation Commissioner[1] gave

[1]As to the significance and effect of the Conservation Commissioner's approval, see page 11, infra.

their approval (R., 61, 72, 73-4). On October 11 the description of the property with the notice of appropriation was filed in the office of the Secretary of State of New York (R., 6-7, 61, 72-3) and copies served upon appellees (R., 43, 61-2, 6-7, 74-5).

The Commissioners of the Palisades Interstate Park then entered upon the property (R., 56, 62) and remained in possession until ousted by the interlocutory injunction (R., 7, 43, 56, 62, 82).

Funds available for appellees' compensation:

The extracts from the Conservation Law, to which reference has already been made, show that the whole credit of the State was pledged to the payment of any judgment the owners of the land might recover in the Court of Claims. Appellees have throughout this litigation treated the case as if it turned upon the amounts of money on hand with the Commission at the time of the appropriation. As to that matter these are the facts:

(1) Assets outside of bond moneys. On October 11, 1928, the Palisades Interstate Park Commission had on hand (in addition to bond issue money, as explained below) more than $500,000 in "moneys, securities and other properties which could be lawfully used for the acquisition of lands for park purposes in any manner" (R., 79).

(2) Bond issue moneys. In 1924 the New York Legislature had passed a measure[1] providing for a $15,000,000 bond issue, the proceeds to be put in the state treasury and used, "after appropriation or appropriations therefrom by the legislature," "for the development, improve-

[1]N. Y. L., 1924, ch. 602, §§1, 3—see Appendix, pp. 36-40.

ment and extension of state parks * * * including the acquisition of lands, and for the establishment of a unified state park system'' (R., 41, 7).

It is necessary under Article VII, Section 4 of the New York Constitution[1] that measures of this sort be submitted to and approved by the People of the State at a general election, and this bond issue act of 1924 was so submitted and approved at the general election held in November of that year (R., 7, 41).

Of the $15,000,000 state park system fund thus authorized, the referendum act itself apportioned $3,500,000 for the development, improvement and extension of the Palisades Interstate Park and for the acquisition of land therefor.[2] In 1926, by Chapter 16 of the Laws of that year, the Legislature accordingly appropriated this $3,500,000 to the Palisades Interstate Park Commission for these purposes[3] (R., 8, 41-2), with the provision—which the referendum act of 1924 likewise contained—that ''the moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate park under the provisions of chapter 170 of the Laws of 1900 as amended''[4] (R., 7, 41).

In 1928 the Legislature reappropriated the whole unexpended balance of the state park system fund—$11,912,850.58 (L., 1928, ch. 75, part 5)[5].

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[1]See Appendix, pp. 5-6.

[2]N. Y. L., 1924, ch. 602, §3; see Appendix, p. 38.

[3]N. Y. L., 1926, ch. 16, §1, subd. 2; see Appendix, p. 41.

[4]N. Y. L., 1924, ch. 602, §4, and L., 1926, ch. 16, §2, subd. 2; see Appendix, pp. 38, 44-5.

[5]See Appendix, p. 53.

The 1926 appropriation law (L., 1926, ch. 16, §4)[1] enacts that before any obligation for the expenditure of the bond moneys thereby appropriated be incurred, a map showing the location and extent of the proposed park, with an estimate of the cost of its acquisition and development, be submitted to and approved by the State Council of Parks, the Governor, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee. Accordingly maps and estimates for the acquisition of appellees' property along with other property in the towns of Clarkstown and Orangetown, in the County of Rockland, were presented to, and received the approval of, these officials on September 29, 1928 (R., 6, 34-5, 54-5). And these officials allocated $600,000 out of the $3,500,000 appropriation of bond issue moneys to cover the estimated cost of the acquisition of "any or all" of these lands (R., 34-35, 55).

(3) General funds of the State: Section 662 of the revised Conservation Law of 1928 makes the approval of the Conservation Commissioner a pre-requisite to the State Park Commissions' acquisition of real property with State moneys, other than moneys derived from the 1924 bond issue.[2]

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[1]See Appendix, pp. 48-9.

[2]"Real property shall not hereafter be acquired with state moneys by any such commission, commissioners, society, board, trustees, corporation, association or authority by condemnation or appropriation, except with the approval of the conservation commissioner; but this provision shall not apply to such acquisitions made or to be made pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four, and such chapter shall not be affected or impaired by this article." (See Appendix, p. 27.)

Before acquiring the Tallman Mountain property, the Commission sought and obtained, in addition to the approval of the other officials, the approval of the Conservation Commissioner (R., 61, 73-4; supra, pp. 7-8), and thereby brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives.

Provisions of the New York Constitution concerning the appropriation of State funds:

There is no limitation upon the power of the New York Legislature to make an appropriation of money. There is simply the requirement (Article III, Section 21) that

> "No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum,"

and the provision in the same Article III (Section 19) expressly authorizing the Legislature to make appropriations to pay Court of Claims judgments:

> "The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

Proceedings in the District Court:

On March 19, 1929, five months after the Commission had taken possession, appellees began this suit against the Commissioners by the service of a bill of complaint (R., 3-11) and an order to show cause why an interlocutory injunction should not be granted (R., 1). The Attorney General and Conservation Commissioner of New York were joined as defendants by virtue of Section 68 of the Executive Law[1] and Section 9 of the Conservation Law[2] (R., 4, 87).

The bill of complaint attacks the entry and appropriation upon the allegations

> That on or about September 29, 1928, defendants, Board of Commissioners of the Palisades Interstate Park, and the Governor, the Chairman of the Senate Finance Committee, the Chairman of the Assembly Ways and Means Committee, and the State Council of Parks, "purporting to act under the provisions of section 4, chapter 16 of the Laws of 1926, and chapter 75, part 5 of the Laws of 1928 of the State of New York," approved maps and estimates for the acquisition of plaintiffs' property and other property in the Towns of Clarkstown and Orangetown and allocated the sum of $600,000 for the acquisition of this land, $500,000[3] of this $600,000 being al-

[1]N. Y. L., 1913, ch. 442, amending L., 1909, ch. 23.

[2]N. Y. L., 1911, ch. 647, §9, as amended by L., 1928, ch. 242, §3.

[3]How plaintiffs arrived at this figure, or what they mean by this allegation, does not appear. There was no separate allocation for plaintiffs' property and the very wording of the official document itself (R., 34, 55) made the full $600,000 available for the "acquisition of *any or all* lands (including lands under water) within the jurisdiction of the Commission, as defined by chapter 242, Laws of 1928, in the towns of Clarkstown and Orangetown, County of Rockland, State of New York, as shown on key map which is attached."

located to the acquisition of plaintiffs' property (R., 6).

That Article VII, Section 4, of the New York Constitution "forbids the creation of state debts save to meet casual deficits or for state defense unless authorized by statute submitted and approved by the people at a general election and only in accordance with such statute so approved" (R., 7).

That in accordance with this constitutional requirement, Chapter 602 of the Laws of 1924 was submitted to popular vote and was approved at the general election held in November, 1924 (R., 7).

That this referendum act allocated $3,500,000 for the Palisades Interstate Park (R., 7, 8) but provided that such moneys should be expended and lands acquired under "the provisions of Chapter 170 of the Laws of 1900 as amended" (R., 7).

That Chapter 170 of the Laws of 1900 contained no provision for the acquisition of lands by entry and appropriation, and was wholly repealed by Chapter 242 of the Laws of 1928, which authorized the Commission to take land by entry and appropriation (R., 7); that "the attempted allocation of $500,000 to such acquisition of said property is therefore void and of no effect, and no sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (R., 7).

That the appropriation of the $3,500,000 by Chapter 16 of the Laws of 1926 had lapsed before October 11, 1928, for the alleged reason that Chapter 75, part 5 of the Laws of 1928, purporting to reappropriate this sum, did not comply with the requirements of Article III, Section 21, of the New York Constitution in that it failed to specify the object to which the amount appropriated was to be applied (R., 7-8).

The bill prays

> That the notice of appropriation, and the acts of defendants thereunder, be adjudged invalid as violative of the contracts clause of the Constitution of the United States (a contention subsequently abandoned), and of the due process clause of the Fourteenth Amendment, and of the due process and just compensation clause of the New York Constitution, and of the provision of the New York Constitution for a referendum upon state bond issues (R., 9);
>
> Further, "that it be adjudged that Chapter 75, Part 5, of the Laws of 1928, in so far as it relates to the 'State Park System Fund' and the reappropriation of $11,912,850.58 is invalid as violative of the provisions of Section 21, Article III, of the Constitution of the State of New York" (R., 10);
>
> Finally, that the defendants be enjoined from "enforcing * * * the provisions" of Chapter 242 of the Laws of 1928 against plaintiffs, *"or from continuing in possession of plaintiffs' said property"* (R., 10).

Proceedings upon the application for Interlocutory Injunction under Judicial Code, Section 266:

The order to show cause (which, together with the supporting affidavits, was served with the bill of complaint) provides that the application for interlocutory injunction "be heard before a court constituted in the manner prescribed by section 266 of the Judicial Code of the United States" (R., 1).

Appellees' affidavits put their objection to having funds derived from the 1924 bond issue applied to their compensation upon the ground that it was the original Palisades Park Act (L., 1900, ch. 170) to which the Referendum Act of 1924 referred, and that after this statute was repealed by chapter 242 of the Laws of 1928, "there-

after there was no statute under which moneys realized from the bonds authorized by Chapter 602 of the Laws of 1924 could be expended in the acquisition of land by the Commissioners of the Palisades Interstate Park" (R., 42).

The affidavits in support of the application make it clear that the $3,000,000 valuation claimed in the bill is based upon the estimated cubic contents of the cliff (R., 46, 53) and upon estimates of the yearly profits of the quarry after it might have come into operation (R., 36-7, 43, 44, 48-9, 50-51); also that the contractual liability of $1,000,000 alleged to have been incurred in the erection of the plant (R., 6), included machinery to be installed in the future as well as machinery already installed (R., 40, 43-4, 52).

Appellants' affidavits in opposition, both executed by Mr. White (a member of the Commission since its inception in 1900, and since 1921 its President [R., 58]) show that the State's taking was confined to real property and that machinery, tools and equipment were permitted to be removed, and were removed, when the State took possession (R., 62, 63, 77).

Mr. White further shows that the Commission's estimate of value—based upon long familiarity with this tract and recent and repeated inspections, and verified by technical advice and data, as well as by its own official experience in appraising quarry properties in this locality (R., 58-9, 63)—was that the property was worth less than $600,000, and that it was upon this estimate that the $600,000 allocation of bond moneys had been obtained. Mr. White also states that the assessed value of this property for tax purposes was only $15,000 (R., 60; supra, p. 7).

Appellees' application for interlocutory injunction and appellants' motion to dismiss—for lack of jurisdic-

tion, for failure to state a cause of action, and for lack of equity (R., 79-81)—were heard together. On June 7, 1929, the three judges of the statutory court rendered an opinion denying the motions to dismiss and granting the interlocutory injunction (R., 86-97).

The decree recites (R., 82) that the Court is

> "of opinion that the provisions of chapter 242 of the laws of 1928 of the state of New York, if so construed as to vest in defendant, Board of Commissioners of the Palisades Interstate Park, power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law of said state and all acts of defendants pursuant thereto, in the absence of funds separately appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made for said lands, are invalid as violative of the provisions of Section 1, Article XIV of the articles in addition to and amendment of the Constitution of the United States of America and of Section 6, Article I and Section 4, Article VII of the Constitution of the State of New York, and that no appropriation of funds has been made by the said legislature for said purposes,"

and provides (R., 82) that

> "Pending final decree in this action and until the further order of this Court the defendants and each of them and each of their officers, agents, servants and employees, their successors in office and any and every person acting or purporting to act under or by virtue of Chapter 242 of the Laws of 1928 of the

State of New York or a certain notice, description or certificate of defendants, Board of Commissioners of Palisades Interstate Park, dated October 11, 1928, with reference to the property hereinafter described be and hereby are enjoined and restrained, jointly and severally, from in any way enforcing or attempting to enforce the provisions of said act, notice, description or certificate against plaintiffs by entry and appropriation as aforesaid or from instituting or prosecuting any action or proceeding at law or in equity by summons, writ, petition, bill or otherwise for the purpose of compelling compliance with or inflicting or recovering any penalty, forfeiture or damage for noncompliance by plaintiffs with said act, notice, description or certificate or *from continuing in possession of plaintiffs' said property,"*

and further restrains defendants (R., 86)

"from doing any acts or things as aforesaid which may in any respect interfere with the ownership or possession of the plaintiffs of the aforesaid property or their free use and enjoyment thereof."

Specification of Errors.

Appellants will urge all the errors assigned (R., 99-104) except 4, which is withdrawn.

Outline of Argument.

The District Court should have dismissed the bill for lack of jurisdiction, because

(I) This Court has settled the principle that the pledge of the full faith and credit of the sovereign—which Section 59 of the New York Conservation Law

gives—is sufficient assurance of just compensation, and (II) that pledge is not limited or qualified by anything in the Constitution or Statutes of the State;

(III) Appellees' objections to being compensated out of bond moneys are groundless as matter of state law;

(IV) Appellees will not be injured by being compensated from this source and are therefore without standing to object;

(V) The absence of an adequate appropriation is not shown—still less the absence of adequate funds—so that the supposed federal question is merely hypothetical;

(VI) There is no basis for injunctive relief and therefore no equity in the bill: Appellees were out of possession, appellants in possession, when suit was brought. The suit is in reality an ejectment action and therefore beyond the jurisdiction of the Statutory Court and of the Federal Court on either the equity or the law side.

(VII) The District Court should have dismissed the bill for want of merit.

(VIII) The Statutory Court erred in holding Section 59 of the New York Conservation Law invalid under the due process and just compensation clause of the New York Constitution.

(IX) The interlocutory decree giving possession and unrestrained control of the property was clearly erroneous.

POINT I.

That the pledge of the general credit of the state assures just compensation and satisfies the constitutional requirement of due process has been decided so often by this Court that a contention to the contrary does not raise a substantial federal question.

The question of the jurisdiction "of the court from which the record comes" is "fundamental"; it "presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not" (*Defiance Water Co.* vs. *Defiance*, 191 U. S., 184, 194).

> *Louisville, etc., Co.* vs. *Mottley*, 211 U. S., 149, 152;
> *Great Southern Fire Proof Hotel Co.* vs. *Jones*, 177 U. S., 449, 453;
> *Mansfield, etc., Ry. Co.* vs. *Swan*, 111 U. S., 379, 382.

Diversity of citizenship admittedly does not exist (R., 3-4). The District Court assumed jurisdiction upon the theory that the suit was one arising under the Constitution of the United States (Judicial Code, §24, subd. 1; U. S. C. A., §41, subd. 1). "The jurisdiction of this court," as Judge Manton said (R., 90),

> "is invoked upon the claim that the plaintiffs' property is being taken without due process in violation of the 14th amendment of the Federal Constitution. That no certain and adequate method of making compensation to the plaintiffs is shown because *the statute* under which the entry and appropriation was made *relegates the plaintiffs to the Court of Claims of the State, but fails to appropriate money to pay*

> *for the property.* Also that it does not sufficiently pledge the credit of the State; even though the Court of Claims of the state be fully vested by the statute with jurisdiction to determine the amount of compensation, *there is no appropriation by the legislature of such an amount as to be reasonably certain to cover an award that may reasonably be made."* (Our italics.)

And it was precisely this "claim" that the Statutory Court sustained (see the recital of the decree—R., 82-3, quoted above at pp. 16-17).

But the statute under which appellees' property was taken, at the same time that it gave the Commission the right to enter and appropriate, gave the landowner the right to sue in the New York Court of Claims and obtain judgment there against the State for the full value of his land, and to have that judgment paid out of the State Treasury. The express provision of the statute is that upon filing in the office of the Conservation Department

> "and in the office of the comptroller, a certified copy of the judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been, or will be taken, by the state, or if an appeal has been taken, a certified copy of the final judgment of the appellate court affirming in whole or in part the judgment of the court of claims, *the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid out of the state treasury."*[1]

[1] N. Y. Conservation Law, §59, subd. 7; see Appendix, p. 26.

Repeated decisions of this Court foreclose any contention that the express pledge of the full faith and credit of the State fails to satisfy the due process requirement of just compensation.

Sweet vs. *Rechel*, 159 U. S., 380;
Backus vs. *Fort Street Union Depot Co.*, 169 U. S., 557;
Adirondack Ry. Co. vs. *New York*, 176 U. S., 335, affirming 160 N. Y., 225;
Williams vs. *Parker*, 188 U. S., 491;
Crozier vs. *Krupp*, 224 U. S., 290;
Bragg vs. *Weaver*, 251 U. S., 57;
Hays vs. *Port of Seattle*, 251 U. S., 233;
Joslin vs. *Providence*, 262 U. S., 668;
Pauchogue Land Corporation vs. *Long Island State Park Commission*, 248 N. Y., 635; certiorari denied, 278 U. S., 657.

This is the basic principle and decisive of this case. We analyze in their order the rulings of this Court in the cases listed:

Sweet vs. *Rechel* involved a Massachusetts statute which permitted the City of Boston to take by entry and appropriation (see 159 U. S., at 382) the land needed for a drainage project and gave the owner the right to bring suit against the city and issue execution against it upon the judgment so recovered. Noting that the Massachusetts Constitution[1] contains no requirement that com-

[1]Like the New York Constitution. See for instance

Jerome vs. *Ross*, 7 Johns. Ch. 315 (Kent, C.);
Rogers vs. *Bradshaw*, 20 Johns., 735 (Kent, C.);
People vs. *Adirondack Ry. Co.*, 160 N. Y., 225;
Kahlen vs. *State*, 223 N. Y., 383;
Pauchogue Land Corp. vs. *Long Island State Park Commission*, 243 N. Y., 15, 24; 248 N. Y., 635.

pensation be paid in advance, and turning to the due process question under the Fourteenth Amendment Mr. Justice Harlan said (p. 402):

> "It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process."

Judge Harlan proceeded to distinguish various cases in which the eminent domain statute required compensation to be paid before title passed from the owner, and—with respect to the constitutional question—concluded (p. 407):

> "We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the Commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

In *Backus* vs. *Fort Street Union Depot Co.*, Mr. Justice Brewer, citing and reaffirming *Sweet* vs. *Rechel*, authoritatively defined the meaning of "due process" in its relation to the eminent domain power of the State (169 U. S., at 569):

> "All that is essential is that in some appropriate way, before some properly constituted tribunal, in-

quiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution.'"[1]

Adirondack Railway Co. vs. *New York*, the next case in chronological order, involved the Adirondack Park Act of New York,—the parent statute in the series of enactments whereby the park system of the State has been built up and the statute whose place the Conservation Law now takes. The Adirondack Park Act (precisely like §59 of the Conservation Law) provided that notice of the State's taking should be served upon "the owner of any real property so appropriated" and that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State" (176 U. S., at 338 and 348).

It was the railway's contention that its "vested right" was violated by the state's acquisition of the land without giving it "any notice whatsoever or opportunity to be heard, and without the making of any compensation therefor" (p. 342).

Fuller, C. J., writing for an unanimous Court, and "agreeing with the New York Court of Appeals" (160 N. Y., 225) and quoting its opinion at length, held the plaintiff without standing to urge the question of notice.

Of the statute's provisions for compensation, he said:

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[1]The Statutory Court misconceived both *Sweet* vs. *Rechel* and *Backus* vs. *Fort Street Union Depot Co.*, citing them for a doctrine exactly opposite to the decisions rendered and the principle laid down (R., 94-5).

"Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for, *Backus* vs. *Union Depot Company,* 169 U. S., 557, and it is the rule in New York that where this is done, and a certain, definite and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the State or one of its municipal subdivisions. *In the Matter of the Mayor, &c.,* 99 N. Y., 569; *Sweet* vs. *Rechel,* 159 U. S., 380, 400.

"This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and incumbrances" (176 U. S., at pp. 349-50—our italics).[1]

Williams vs. *Parker* sustained a Massachusetts statute limiting the height of buildings in the Copley Square district of Boston, and providing that any owner of buildings under construction at the time of the enactment who suffered damage by its enforcement, "may recover such damage or loss from the City of Boston by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city" (188 U. S., at 492-3). The attorney-general of Massachusetts began a proceeding to enforce this statute against certain buildings; the owners opposed the application, showing that they had started suits against the City of Boston to recover their damages and that the City resisted the claims

[1]The Statutory Court cited this case too for a doctrine opposite to its decision (R., 94-5). From the citation it would appear that this Court, instead of sustaining the State's entry and appropriation in the *Adirondack* case, had held it void.

and had entered a general denial in the actions. They contended that the enforcement of the statute against their property ought to be "stayed until the City's liability could be conclusively determined" (p. 493). The City was "not a party to the proceedings" to enforce the statute and "therefore not estopped to deny its liability by reason of having sought and obtained the condemnation" (p. 503).

Even upon these peculiar facts, Mr. Justice Brewer, writing for an unanimous Court, sustained the enactment upon the authority of *Backus* vs. *Fort Street Union Depot Co.* and cases therein cited. He said (pp. 503; 504):

> "No question is made as to the general solvency of the city of Boston.[1] Although in the agreed facts it is stated that the city has no 'moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate or pay money for such a purpose,' yet as this statute provides that 'any person sustaining damage * * * may recover such damage * * * in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway'; and as there is a general statute making suitable provision for such a recovery, the question of solvency does not seem to be material."

And again:

> "That there may be novel questions in respect to the measure of damage, the value of the property

[1]It is hardly necessary to say that in the present case "no question is made as to the solvency" of the State of New York. Since the enactment of its income tax law in 1919, New York has made three reductions in the income tax rate (N. Y. L., 1919, ch. 627, amended L., 1924, ch. 27; L., 1925, ch. 196; L., 1926, ch. 209).

> that is taken, does not avoid the fact that a solvent debtor, one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence, is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage."

Noting "the prior decisions of the Supreme Court of the State as well as that in this case," Judge Brewer declared (pp. 504; 505) this Court's "opinion":

> "It cannot be held that there was a failure to make adequate provision for the payment of the damages sustained."

And again:

> "The statute in question cannot be adjudged in conflict with the Federal Constitution."

Crozier vs. *Krupp* is as plain a ruling as could ever be made:

Krupp, the German munitions manufacturer, sought to enjoin General Crozier from using its patents in the manufacture of ordnance. At the time suit was brought and indeed until after the decision of the Court of Appeals of the District of Columbia sustaining the bill, this was the only redress the plaintiff could have. For the federal statutes up to that time permitted no action against the United States for the use of a patent unless a contract to pay could be implied (see 224 U. S., at p. 304).

While General Crozier's appeal to this Court was pending, Congress passed a law providing that when a patent was "used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation by suit in the Court

of Claims.'"[1] This Court held that the new enactment was in substance a provision "for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides" (p. 305).

Whether the provision for compensation was adequate was then considered. "This inquiry may be solved," Chief Justice White said, "under the conditions here involved, *by taking the most exacting aspect* of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use" (p. 305—our italics). Examining these requirements from this angle—in their "most exacting aspect"—he stated them as follows (p. 306):

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again always having reference to the nature and character of the property taken, its value and the surrounding circumstances, *the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by*

[1]Act of June 25, 1910, 36 Stat., c. 423, p. 851, quoted 224 U. S., at 302-3.

necessary implication, of the public good faith to that end.'[1] (Our italics.)

It was therefore held that (although the original taking and use of the patents was without any statutory warrant and clearly unlawful) no action to restrain their use could be maintained after the enactment of the law that gave the owner the right to sue the United States and recover compensation in the Federal Court of Claims. In the concluding paragraph of his opinion (p. 308), Chief Justice White said:

> "Clearly under the circumstances now existing, that is, the acquiring by the Government under the right of eminent domain, as the result of the statute of 1910, of a license to use the patented inventions in question, there could be no possible right to award at the end of a trial the permanent injunction to which the issue in the case was confined. Moreover, taking a broader view and supposing that a final decree granting a permanent injunction had been entered below, in view of the subject-matter of the controversy and the right of the United States to exert the power of eminent domain as to that subject, at most and in any event the injunction could rightfully only have been made to operate until the United States had appropriated the right to use the patented inventions, and as that event has

[1] Judge Manton seized upon Chief Justice White's references to the character of the property taken and to the circumstance that the use only was appropriated, as a basis for distinguishing the case at bar involving the fee of real estate (R., 95-6). But a taking of "'the use and value,'" as Mr. Justice Pitney ruled in *U. S.* vs. *Cress* (243 U. S., 316, 328, quoting Brewer, J., in *U. S.* vs. *Lynah*, 188 U. S., 445, 470) "'must be regarded as an actual appropriation.'" And *Crozier* vs. *Krupp* has been recognized as authority in later cases involving the appropriation of the fee of real property (*Joslin Co.* vs. *Providence*, 262 U. S., 668, 677; *Bragg* vs. *Weaver*, 251 U. S., 57, 62).

happened the injunction, if granted, would no longer have operative force."

Accordingly the decision of the District of Columbia Court of Appeals, although right upon the facts as they were at the time of its rendition, was reversed by this Court upon the facts as they had come to be.

Since the *Crozier* decision the principle has been recognized as so well established that subsequent rulings in this Court have taken the form of brief statements citing the earlier decisions.

In *Hays* vs. *Port of Seattle* the plaintiff had had a contract with the State of Washington under which he was to improve a waterway in Seattle Harbor. Subsequently, the Legislature created the Port of Seattle a corporate body with territorial limits that included this waterway, and a year or two later the Legislature enacted a statute (Sess. Laws 1913, p. 195) vacating the project upon which plaintiff was employed and vesting the title to the waterway in the Port of Seattle. The plaintiff sought to have the enforcement of this statute enjoined "upon the ground (a) that it impaired the obligation of an existing contract between him and the State in violation of §10 of Art. I of the Constitution of the United States; and (b) that it deprived him of property without due process of law, contrary to §1 of the Fourteenth Amendment" (251 U. S., at 234).

The Washington Code authorized "any person having a claim against the State to begin an action thereon in a

designated court upon the mere giving of security for costs," the action "to proceed in all respects as other actions, with a right of appeal to the Supreme Court[1], and, in case of a final judgment against the State, a transcript of it is to be furnished to the Auditor of State, who is required thereupon to 'audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury'" (251 U. S., at 238):

Citing *Bragg* vs. *Weaver* in the same volume (251 U. S., 57, where *Sweet* vs. *Rechel, Backus* vs. *Fort Street Union Depot Co., Adirondack Railway Co.* vs. *New York, Williams* vs. *Parker* and *Crozier* vs. *Krupp* were all cited), Mr. Justice Pitney sustained the statute with the brief statement (p. 238):

> "This statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking."[2]

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[1]For the right of appeal in New York from the Court of Claims to the Appellate Division and the Court of Appeals, see Court of Claims Act, appendix, p. 61, and for an illustration, see *Rockaway Pacific Corp.* vs. *State of N. Y.*, 243 N. Y., 556.

[2]The Port of Seattle legislation carried no appropriation; the procedural provisions of the Washington Code for suits against the State of course carried none; the briefs of counsel make no reference to any appropriation, and we are unable to find any appropriation for the purpose of paying judgments arising out of the Seattle improvement in any statutes down to and through the date of the decision.

Judge Manton completely misconceived *Hays* vs. *Port of Seattle*:

He thought that the "only question" there was the question under the contracts clause (R., 97). As we have seen from the extracts quoted, the due process clause also was invoked and the question of due process expressly decided against the plaintiff by this Court.

In *Joslin Co.* vs. *Providence*, Mr. Justice Sutherland thus stated the principle and listed the authorities that had established it (262 U. S., at 677):

> "It has long been settled that the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. *Sweet* vs. *Rechel*, 159 U. S., 380, 400, 404, 407; *Williams* vs. *Parker*, 188 U. S., 491, 502-503; *Crozier* vs. *Krupp*, 224 U. S., 290, 306; *Bragg* vs. *Weaver*, 251 U. S., 57, 62; *Hays* vs. *Port of Seattle*, 251 U. S., 233, 238; *Adirondack Ry. Co.* vs. *New York*, 176 U. S., 335, 349."[1]

Pauchogue Land Corporation vs. *Long Island State Park Commission* shows the application of the principle thus settled to the precise Section 59 of the Conservation Law here involved. There were two opinions of the Court of Appeals (243 N. Y., 15 and 248 N. Y., 635), each dealing with a different appropriation.

The former of these opinions was rendered upon plaintiff's pleading attacking the earlier appropriation. Plaintiff by its complaint alleged—and defendants by their motion to dismiss the complaint admitted—that at the time of that appropriation the Long Island Commission had no moneys on hand. Upon this admitted fact, plaintiff contended that the entry and appropriation was invalid both as matter of constitutional and of statutory law. The Court of Appeals expressly overruled the constitutional objection, finding the pledge of

[1]That the Statutory Court misconceived this case too, see *infra*, p. 45.

the general credit of the State, given by Section 59, a complete answer (243 N. Y., at pp. 24-5). It did sustain the objection based upon a provision of the Long Island State Park Act.[1]

During the pendency of the litigation, a private donor gave the Commission $262,000 for the express purpose of acquiring the particular property. This sum represented the Commission's estimate of the value; the landowner's estimate was several times greater. After receiving the gift, the Commission made a second appropriation, which the Court of Appeals, citing and relying on its earlier opinion, sustained against all objections (248 N. Y., 635).

The Pauchogue Land Corporation sought to have this determination reviewed by this Court, urging that the existence of a legislative appropriation of moneys was a requirement of due process.

Chief Judge Cardozo denied the application for leave to appeal with the endorsement:

> "It does not appear that any substantial federal question is involved."

Justices Stone and Brandeis both heard oral argument upon the same application and both denied it; the whole Court refused *certiorari* (278 U. S., 657).[2]

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[1]The Long Island State Park Act, §8 (now §777 of the Conservation Law) gave the Long Island Commission "power *from moneys or property on hand or appropriated for its use* to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction." (There is no such limitation upon the Palisades Commission.)

[2]That the Statutory Court misconceived the *Pauchogue* case and the whole line of New York authorities, see Point VIII infra, especially pp. 73-74.

Appellees' contention—that an exercise of the state's power of eminent domain violates the due process clause of the federal constitution unless there has been an antecedent appropriation in an amount reasonably sufficient to pay any award that the owner may subsequently recover—is then foreclosed by the long line of decisions in this Court.

There was no antecedent appropriation in any sum in *Williams* vs. *Parker*, none in *Crozier* vs. *Krupp*, none in *Hays* vs. *Port of Seattle*. In the first of these cases this Court sustained a taking by the City, in the second a taking by the United States, in the third a taking by the State.

One who would make out a case arising under the Constitution of the United States must show a substantial federal question (*Cuyahoga Co.* vs. *Northern Ohio Co.*, 252 U. S., 388, 397; *Newburyport Water Co.* vs. *Newburyport*, 193 U. S., 561, 579). A question that this Court has declared to be "long settled" (*Joslin Co.* vs. *Providence, supra*), cannot be substantial.

Merriam Co. vs. *Syndicate Publishing Co.*, 237 U. S., 618, 621, 624;
Equitable Life Assurance Society vs. *Brown*, 187 U. S., 308, 311;
Trenton vs. *New Jersey*, 262 U. S., 182, 192;
Wick vs. *Chelan Electric Co.*, 50 Sup. Ct. Rep., 41, decided Nov. 25, 1929.

POINT II.

Every provision of the New York Constitution and statutes that the Court below took as a reason for rejecting the principle settled by this Court, is in reality but an additional reason for applying that principle.

(1) *No antecedent appropriation can assure payment of the Court of Claims' award. Except in rare cases any antecedent appropriation would have lapsed before the award could be made.*

The precise proposition the Statutory Court decided was that Section 59 was invalid unless the entry and appropriation was preceded by an appropriation of funds reasonably adequate to pay the value of the land as subsequently determined by the Court of Claims. But no such antecedent appropriation could give any assurance of *payment:*

Any appropriation of funds by the New York Legislature lapses after two years[1],—as plaintiffs' own pleading alleges (R., 8). And the owner of lands taken by entry and appropriation has exactly two years after service of the notice within which to *commence* his suit for compensation in the Court of Claims[2]. The Court of Claims Act gives either side the right of appeal[3]. So that in almost every instance the provision of funds actually to pay for the land must rest with a subsequent legislature.

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[1]Article III, §21; Appendix, p. 4.

[2]N. Y. Conservation Law, §59, subd. 7; Appendix, p. 25.

[3]N. Y. Court of Claims Act, §29; Appendix, p. 61.

(2) *Neither could an antecedent appropriation assure full compensation. That assurance only the pledge of the full faith and credit of the state can give.*

Even where the eminent domain statute requires that reasonably adequate funds be on hand when the property is taken (as does the Long Island State Park Act, supra, p. 32), the Court of Appeals has recognized the impossibility of any preliminary estimate being infallible, and the consequent necessity of falling back upon the pledge of the State's credit in order to insure *full* compensation. Thus Judge Pound, even when enforcing the statutory limitation imposed upon the Long Island Commission, took pains to say (243 N. Y., at 27):

> "It by no means follows that if the amount of money appropriated by the Legislature is inadequate fully to pay the judgment of the Court of Claims, compensation is not sufficiently provided for to meet constitutional demands and that an act of appropriation of lands is, therefore, *ultra vires* and void. The amount appropriated is a qualified limitation upon the power to act. Public officials are presumed to act within their authority and if they in good faith and with authority of law appropriate lands found by the Court of Claims to be of greater value than the amount actually appropriated therefor, *the credit of the State may be pledged to meet the deficiency.* Otherwise the whole plan of appropriation by entry or condemnation would be dependent on the infallibility of the public officials in estimating the true value of property taken by them for State purposes."

It is only the State's promise to pay—only the pledge of the "credit of the State"—that can assure compensation in full.

(3) *Article III, §21 of the New York Constitution imposes no limitation upon the Legislature's power to make appropriations.*

Judge Manton (R., 94; see also 88) cited and seemed to rely heavily upon the sentence of Article III, Section 21, which reads:

> "No money shall ever be paid out of the Treasury of this State or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law."

This sentence imposes no limitation upon the power of the Legislature to make appropriations to pay Court of Claims' judgments and no limitation upon its power to appropriate for any purpose. It simply insures that the Legislature and no other body shall make appropriations. The provision does not qualify or limit in any way the unequivocal promise to pay out of the State Treasury which Section 59 of the Conservation Law gives. It is the exact equivalent of the provision in the Constitution of the United States (Article I, Section 9, clause 7) that "no money shall be drawn from the Treasury but in Consequence of Appropriations made by law." That provision did not derogate from the assurance of just compensation which this Court found in *Crozier* vs. *Krupp*. And the Constitution of the State of Washington—whose enactment this Court sustained in *Hays* vs. *Seattle*—contained a provision (Art. VIII, §4) identical with Article III, Section 21.

The only restriction the New York Constitution puts upon the State's power of eminent domain is that "private property" shall not "be taken for public use without just compensation" (Art. I, §6, appendix, p. 3).

It is therefore the duty of the Legislature to appropriate whatever sum is needed to compensate the owner after the amount of just compensation has been fixed. As Chancellor Kent said in the first great decision establishing the constitutionality of the appropriation practice (*Rogers* vs. *Bradshaw*, 20 Johns., 735, 745):

> "This equitable and constitutional title to compensation undoubtedly imposes it as an absolute duty upon the legislature to make provision for compensation whenever they authorize an interference with private right."[1]

And Article III, Section 19, expressly authorizes the Legislature to perform this duty:

> "The Legislature shall neither audit nor allow any private claim or account against the State, *but may appropriate money to pay such claims as shall have been audited and allowed according to law.*"

(4) *The allocation of funds by administrative officers cannot limit the Court of Claims in making its award or the Legislature in making appropriation to pay the award.*

Judge Manton asserted (R., 91-2)—what the bill of complaint had assumed (R., 7-8)—that the amount of compensation recoverable "was limited to some part of $600,000 which was allocated to the Palisades Interstate Park."

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[1]Compare upon the relation between the due process and just compensation section (Article I, 6) of the New York Constitution, and the next section (Article I, 7) authorizing the determination of claims against the State without a jury, and thereby authorizing the determination of compensation by the Court of Claims, Vann, J., in *People* vs. *Adirondack Railway Co.*, 160 N. Y., 225, 237-8.

This is wholly wrong:

The utmost effect the allocation could have would be to limit the amount of *bond issue moneys*[1] available until a further allocation was made. The *Pauchogue* case flatly decided that even where the presence of reasonably adequate funds was by statute made essential to a valid entry and appropriation, the amount of funds on hand cannot affect the State's absolute obligation to pay the full value of the property (supra, p. 35). Still less can the State's obligation and promise to pay in full be limited by a preliminary estimate of the probable cost to the State made by administrative officials,—and that is what an allocation is. Just this the latest of the Long Island Park cases—*Flagg* vs. *Moses*—expressly held. In that case "the defendants had at their disposal for the purchase of park lands on Long Island, $190,000, and allocated for the particular site here involved the sum of $149,500" (132 Misc., 494, 495). "At the trial the plaintiffs' experts placed the value upon the land taken far in excess of the estimate of the defendants" (p. 496). Judge Humphrey, quoting the same language of Judge Pound's that we have quoted (supra, p. 35), sustained the entry and appropriation, saying (pp. 496-7):

> "The foregoing expression by the Court of Appeals applies the test of good faith on the part of the Commissioners. If the defendants are sustained in the act of taking, the plaintiffs through the Court of Claims, will receive the full value of their lands at the time of taking without regard to the sum available to the Commissioners at the time of entry.
>
> I find that the Commissioners did act in good faith,

[1]That the requirement of allocation contained in the 1926 Appropriation Act was confined to the bond moneys and that with respect to the other resources of the State only the approval of the Conservation Commissioner was required and that that approval was had, see supra, pp. 10-11.

and that the test of reasonable adequacy applied in the *Pauchogue* case was present here.

The foregoing is sufficient to defeat the plaintiffs' cause of action."

The Appellate Division unanimously affirmed Judge Humphrey's decision (225 App. Div., 887) and the Court of Appeals declined to review it (April 23, 1929).

The notion that the amount allocated in advance by administrative officials or even the amount appropriated in advance by the Legislature can operate as a limitation upon the owner's ultimate recovery has thus been expressly rejected by the New York courts in the recent park litigations in that State. And this Court, when it considered and sustained the Rock Creek Park legislation of Congress, took the same view (*Shoemaker* vs. *United States*, 147 U. S., 282, 302):

"The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had any-

thing to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to."

(5) *Section 50 of the Conservation Law has no application to the Palisades Park Commission.*

Section 761 of the Conservation Law declares that the Palisades Park Commission "in addition" to other methods of acquisition "shall have the power to acquire lands by entry and appropriation in the manner provided for in Section 59." To no other section does Section 761 make the least reference.

But the Statutory Court (R., 94) seems to have read into Section 761 a limitation contained in Section 50 of the Conservation Law. This was a misconception:

The first part of Section 50 (through subdivision 2 to which Judge Manton refers [R., 94]) reads as follows (Appendix, p. 22):

"The conservation department shall, for the purpose of carrying out the provisions of this article, have the following powers, duties and authority to be exercised through or by the division of lands and forests:

1. Have the care, custody and control of the several preserves, parks and other state lands described in this article.

2. Have the power to establish, acquire, control and manage other state parks and parkways in the forest preserve counties, and in the counties of Albany, Jefferson, Montgomery, Schenectady and Schoharie, and to acquire lands for such purposes when moneys have been appropriated therefor."

A later subdivision (30) of Section 50 makes it clear that Subdivision 1 is not intended to bring the Palisades Interstate Park within the Conservation Commissioner's "care, custody and control." That subdivision provides:

> "Nothing in this chapter shall be construed as extending the jurisdiction of the division of lands and forests over the real or personal property now or hereafter under the control or in the custody of the commissioners of the Palisades interstate park, but said division, subject to the powers of the commissioner, is authorized to cooperate with said commissioners of the Palisades interstate park by the joint employment of wardens, foresters and keepers, for the mutual protection of the lands under their respective jurisdiction and other state commissions and the preservation of the forests thereon and of the fish and game therein."

Nor does the Commissioner's power to establish and acquire land (subject to the limitation "when moneys have been appropriated therefor" [Subdivision 2, supra]) extend to the territorial limits within which the Palisades Interstate Park Commissioners have the right of eminent domain. Orange and Rockland Counties are not among the counties enumerated in Subdivision 2 nor are they among the Forest Preserve Counties of the Adirondack and Catskill regions.[1]

Whenever the New York Legislature has seen fit to impose upon a particular park commission any limitation in acquiring lands, it has done so in the particular statute relating to and defining the powers of that com-

[1]The Forest Preserve Counties are enumerated in Section 63 of the 1928 Conservation Law. For a statutory recognition of the difference between these counties and the Palisades Interstate Park region, see Appendix, p. 41.

mission. Each of these statutes was originally an independent act and has now, in the consolidated Conservation Law, become a separate part of Article XVI, which deals with the Division of Parks. Thus Part 9 of Article XVI is the Palisades Park Act, Part 11 the Long Island Park Act, etc.

The Legislature did not limit the power of entry and appropriation given to the Palisades Commission—the only interstate park commission—by any reference to moneys on hand or moneys appropriated.

The demonstration that the Statutory Court was wholly wrong in its attempt to read Section 50 into Section 761 concludes this argument. It should, however, be remarked that even if the Court had been right in its construction and if the Commissioners could be conceived to have violated Section 50, the circumstance could not give jurisdiction to the Statutory Court. It would merely mean that the Commission had violated a state statute,—not that the statute was void.[1] And it is only "upon the ground of the unconstitutionality" of the "statute" that jurisdiction can be taken under Section 266 of the Judicial Code.

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[1]Thus Pound, J., when he ruled that the first *Pauchogue* appropriation was void because of the absence of moneys on hand or appropriated to the Commission's use (supra, p. 32) defined the "question" as one "of statutory construction rather than one of constitutional law" (243 N. Y., at 26).

(6) The *Statutory Court entirely misconceived the legislation involved in Rockaway Pacific Corporation* vs. *Stotesbury, and therefore misconceived the decision rendered.*

Judge Manton cited *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345), for his ruling that "since money was not provided to pay an award, therefore the statute is in conflict with the Fourteenth Amendment" (R., 95).

An examination of the statute and facts involved in the *Rockaway Pacific* case will immediately show that that case furnishes no support at all for the decision below.

The statute involved was Chapter 13 of the New York Laws of 1917—"An Act to amend the state law, relative to the acquisition of land by the state for purposes of public defense." One of its provisions was:

> "The governor may, if requested by any officer or agent of the United States duly authorized under the hand and seal of any head of an executive department of the government of the United States, execute a deed or release to the government of the United States of the lands and the structures and waters thereon, described in the survey and map filed in the office of the secretary of state as hereinbefore provided. Such deed or release may be so executed at any time after the commission shall have entered upon and taken possession of such lands, structures and waters."

As appears from the title the purpose was to authorize the State to take land "for purposes of defense" in the then pending war with Germany and turn it over to the Government of the United States. It was therefore expected and intended that the property thus taken should

be paid for not by the state but by the federal government. The statute, therefore, did *not* pledge the credit of the state:

It gave the owner the right to sue in the New York Court of Claims,—"The court of claims shall have jurisdiction to determine the amount of such compensation, and upon proceedings being brought before such court as provided by law, an award shall be made of compensation for the lands, structures and waters so appropriated." But it omitted the promise that the owner's compensation for the property taken, as determined by the Court of Claims, shall be paid out of the state treasury.

The next section of the act emphasizes the deliberateness of this omission. The legislature *did* intend that the State should pay for "all searches necessary to prove the title," and so expressly provided that "the expense of making such searches shall be paid by the state treasurer out of funds appropriated therefor, on the warrant of the comptroller."

Obviously, the decision in the *Rockaway* case,—that a statute which intentionally omitted to pledge the state's credit is unconstitutional,—has no application to a case where that pledge is given in express and unmistakable language.[1]

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[1]The Pauchogue Land Corporation built a great deal of argument in all courts upon the *Rockaway Pacific* case, and in its *certiorari* application to this Court devoted the first point of its brief to that case alone.

The only mention of the *Rockaway* decision by any court in the *Pauchogue* litigation was the following clear statement of the distinction between the constitutional issue there and the issue in the *Pauchogue* case (and in the case at bar):

> "The case of *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345) has been urged by the respondent as an authority in support of its point that there must be a present or pre-existing legislative appropriation for the property taken. The case was decided by a divided court, but even if we accept the majority view, the statute there under review, as was stated by Circuit Judge Ward: 'goes no further in protection of the landowner than to provide the manner in which the amount of his compensation shall be ascer-

(*Footnote continued on next page.*)

(7) *The Statutory Court completely overlooked the fundamental presumption that the State will perform its obligations and pay its debts.*

The Statutory Court seemed to think that Section 59 gave no assurance of payment because the award which the owner can recover in the Court of Claims cannot be enforced against the State by execution (R., 96). It attempted to distinguish *Joslin Co.* vs. *Providence* as a case where " 'the owner under the statute may have execution issued against the city' " (R., 97).

Of course appellees cannot have execution against the State of New York any more than the plaintiff in *Crozier* vs. *Krupp* could have had execution against the United States. But this means of enforcing a judgment is not needed where the debtor is the sovereign. This Court in *Joslin Co.* vs. *Providence* said in so many words that the rule was the same in any case of "taking of property for public use by a State *or* one of its municipalities" (262 U. S., 668, 677; and see *Adirondack Railway* vs. *New York*, 176 U. S., at 350).

(*Footnote continued from p.* 44.)

tained.' The statute there criticised failed to express how the compensation, when ascertained, should be paid. There was no provision, as is here the case, requiring the Comptroller to draw his warrant on the Treasurer and commanding the latter officer to make payment. The most that the statute did was to permit the fixation of the amount of compensation. The method or means of payment was not stated. Therefore, the cited case and the one at bar are quite different in this most important respect."

Pauchogue Land Corporation vs. *Long Island State Park Commission*, 215 App. Div., 816, 824.

The quotation is from a dissenting opinion of Kapper, J., in the Appellate Division, with whom Kelly, P. J., concurred. The discussion was of the first entry and appropriation. The Court of Appeals, while disagreeing with these judges on a point of statutory construction present in the first *Pauchogue* appeal and not here present (*supra*, pp. 31-2) was in full accord with them on the constitutional question (*infra*, pp. 46-7).

That the Statutory Court *proposed* such a distinction, a distinction against the sovereign and in favor of a mere municipal subdivision, shows that it overlooked the underlying reason—the fundamental presumption—upon which the whole line of decisions of this Court rests. We mean the presumption that the sovereign will pay its debts and discharge its obligations (*Great Falls Mfg. Co.* vs. *Attorney General*, 124 U. S., 581, 597).

For particularly striking statements and applications of the principle see, besides the decisions of this Court analyzed in Point I, the following cases in the State Courts:

Talbot vs. *Hudson*, 82 Mass., 417, 431, 432 (cited as an authority on the general subject in *Sweet* vs. *Rechel*, 159 U. S., at 393);
Orr vs. *Quimby*, 54 N. H., 590;
Bridge Co. vs. *Union and Northumberland Counties*, 232 Pa., 255 (opinion by Moschzisker, J.);
St. Joseph & Grand Island Ry. Co. vs. *City of Hiawatha*, 95 Kan., 471;
Minnesota vs. *Messenger*, 27 Minn., 119.

The New York courts have *not* overlooked this presumption. Chancellor Kent did not overlook it when a century ago he rendered the great decision which settled the foundations of the subject.[1] Nor did the judges through whose courts the *Pauchogue* case so recently passed overlook the presumption. In the Appellate Division, Judge Kapper—with whom the Court of Appeals agreed upon the constitutional question—said (215 App. Div., at 824):

[1] *Rogers* vs. *Bradshaw*, 20 Johns., 735 (1823—cited by this Court in *West River Bridge Co.* vs. *Dix*, 47 U. S., 507, 542, and in *Sweet* vs. *Rechel*, 159 U. S., at 404); and see *supra*, p. 37 and *infra*, p. 74.

> "No instance has been called to our attention where the State of New York has refused to pay a judgment of the Court of Claims which it has authorized that court to render,"

and Judge Pound, writing for the Court of Appeals upon this constitutional question said, 243 N. Y., at 24:

> "We may assume that compensation need not be specifically provided by an appropriation of moneys therefor before the property is appropriated. The faith of the State may be ample security if it opens the door to the claimant to obtain the obligation of the State to pay. *It may be assumed that it will faithfully meet its obligations thus established.*"[1] (Our italics.)

Every reason the Statutory Court found for assuming jurisdiction thus turns out upon analysis to be only an additional argument against the jurisdiction.

The plain fact is that in every form readily imaginable this Court has by its long line of decisions, foreclosed the question appellees urged:

Where—as here—the appropriating body has been put in funds by the Legislature, where private bounty has supplied the funds for the public acquisition (*Pauchogue*

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[1]Court of Claims judgments have long been recognized as legal investments for savings banks in New York (N. Y. Banking Law, §239-a, subd. 1—N. Y. L., 1915, ch. 269 [amending L., 1914, ch. 369]; amended L., 1920, ch. 701), and for the Comptroller of the State in investing its trust funds (N. Y. County Law, §12, subd. 19—N. Y. L., 1905, ch. 244, amended L., 1909, ch. 16).

vs. *Long Island State Park Commission*), and where there were no funds on hand from any source (*Crozier* vs. *Krupp, Hays* vs. *Port of Seattle*);

Where—as here—the obligation of the sovereign is express and where that obligation arises by "implication" only (*Crozier* vs. *Krupp*);

Where—as here—it is the sovereign itself that appropriates and where the power is exercised by a municipal subdivision merely (*Williams* vs. *Parker*);

Where—as here—it is conceded by the bill that the State's highest officials, executive and legislative, have concurred in the appropriation and unite in maintaining its validity and where it is "agreed" that the condemning agency is "no party to the proceedings" and "is not estopped to deny liability" (*Williams* vs. *Parker*);

Where—as here—statutory authorization preceded the taking and where a later enactment was required to give a retroactive validity (*Crozier* vs. *Krupp*).

The Chief Judge of the State whose legislation was involved in the *Pauchogue* case and is involved in this case then made no mistake when he wrote the endorsement:

> "It does not appear that any substantial federal question is involved."

POINT III.

Appellees' objections to being compensated out of moneys authorized by the people in 1924, appropriated by the Legislature in 1926 and reappropriated in 1928, are without color of merit. It cannot be assumed that the New York Courts would sustain them and they cannot be made to serve as a basis for the jurisdiction of the Federal Courts.

Appellees do not allege that the use of moneys derived from the 1924 bond issue has been interfered with in any way by state courts or state officers. What appellees contend is that on their own construction of the 1924 Referendum Act, and their own interpretation of Article III, §21 of the state constitution the bond moneys are not available.

These constructions present questions of state law only, and the New York courts would have to rule upon these questions in accordance with appellees' contention before any impediment to appellees' full compensation, and consequently any due process question under the Fourteenth Amendment could—even on appellees' own theory—arise. And these constructions, as we shall see, are not even plausible constructions.

The present is therefore a typical case for the application of the rule which forbids the Federal Courts to assume jurisdiction upon a showing of hypothetical issues merely.

A.

Appellees' major objection (R., 7, 8) to being compensated out of the $3,500,000 appropriated in 1926[1] and reappropriated in 1928[2] is that the Referendum Act of 1924 and the Appropriation Act of 1926 both provided

[1] N. Y. L., 1926, ch. 16, see Appendix, p. 41.

[2] N. Y. L., 1928, ch. 75, see Appendix, p. 53.

that the land be acquired "under the provisions of chapter one hundred and seventy of the laws of nineteen hundred as amended"[1], whereas appellants propose to use it to pay for property taken by entry and appropriation,—a method the Commission was first empowered to use in 1928 when the revised Conservation Law repealed the Palisades Act of 1900 and re-enacted it with certain additions, including one giving the entry and appropriation power.

While Judge Manton sustained this objection (R., 91-92), it is demonstrably erroneous. It cannot be doubted that this reference to amendment in the Referendum Act—"the lands shall be acquired by the Commissioners of the Palisades Interstate Park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred as amended"—was designed to include just such an enlargement of the Commission's authority as the revised Conservation Law of 1928 effected.

It has long been a rule of statutory construction in New York declared by the Legislature itself (General Construction Law, §80)[2] that "if any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision." The reference in the Referendum Act of 1924 to the Palisades Park Act of 1900 must accordingly "be deemed" a reference to Part 9 of the 1928 Conservation Law,—the Law which consolidated the several park statutes and which at one and the same time repealed[3] and "in substance re-enacted"[4] Chapter 170 of the Laws of 1900.

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[1]See Appendix, pp. 38, 44-45.

[2]N. Y. L., 1909, ch. 27, §80, formerly L., 1892, ch. 677, §32. See Appendix, p. 54.

[3]See Appendix, p. 35.

[4]See Appendix, pp. 27, 35.

The rule which the General Construction Law of New York thus declares is the rule of the common law. As Mr. Justice Field put the matter (*Steamship Co.* vs. *Joliffe,* 2 Wall., 450, 458-9):

> "The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in *Wright* vs. *Oakley* [5 Metc., 406], upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the State, may with propriety be applied to the case at bar.
>
> " 'In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones.' "

The new Section 761[1] was none the less an amendment because its provisions effected not an alteration in the statute but an addition to the statute:

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[1]Appendix, p. 34.

> "*In addition* to the various methods of acquiring lands provided for in this part of this article, the commissioners of the Palisades interstate park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."

"An amendment may be *an addition to* as well as an enlargement of the sections of the statute existing at the time of such amendment" (*Bohmer* vs. *Haffen*, 35 App. Div., 381, at 386, aff'd 161 N. Y., 390—see 405-6). "The definitions of the word 'amendment' include *additions* to, as well as corrections of, matters already treated" (*Christian Feigenspan, Inc.*, vs. *Bodine*, 264 Fed., 186, at 190; aff'd 253 U. S., 350—see 352, 386).

To the same effect, see

> *State* vs. *Chadbourne*, 74 Me., 506, 508;
> *Commonwealth ex rel. Cummings* vs. *Attorney General*, 13 Pa. Dist., 521, 525.

With the propositions thus established beyond debate that the reference in the 1924 Bond Act to the original Palisades Park Act is to "be deemed" a reference to the Statute which repealed, re-enacted and in all respects replaced it, and that an addition is an amendment, there remains to be considered only whether the reference of the Referendum Act to "Chapter 170 of the Laws of 1900 as amended" meant to include only amendments made before the Referendum Act was passed,—and none that might thereafter be made.

Ordinary usage and familiar grammatical principles forbid such a construction. There is no future participle in English: the past participle has to do duty for the future. And the past participle does duty for the future in one of the commonest of legal phrases,—in a sale of securities "if, when and as delivered."

And decisions of the New York courts and the clearly shown usage of the New York Legislature likewise forbid the construction which excludes future amendments:

The Appellate Division, in an opinion by Judge Miller, construed "rules established as aforesaid" as "obviously referring," among other things, to rules *"to be established"* (*People ex rel. Garvey* vs. *Prendergast*, 148 App. Div., 129, 132—our italics).

The Court of Appeals declared the phrase "except such as are by special laws for that purpose expressly allowed," in Section 55 of the Revised Statutes, prohibiting the racing of animals, not to be "limited to the time of the adoption of those statutes" but to have also *"a prospective effect"* and to "except such trotting as has been allowed by special laws then existing *or passed since that time"* (*Harris* vs. *White*, 81 N. Y., 532, 545—our italics).

And the very revision which appellees say was not within the meaning of the phrase because the phrase refers to past amendments only, completely refutes that construction. The 1928 Conservation Law itself contains the phrase "as amended" in a context where the reference must be to future amendments. Section 674 of the 1928 Conservation Law provides that the "eighth park region shall be governed by the provisions of Section 748 of this chapter as amended." Now Section 748 was a new section written into the Conservation Law when Section 674 was adopted. Any reference to the amendment of Section 748 must therefore be to amendment in the future.

Indeed, the construction which includes future amendments within the "as amended" reference is the only construction which gives any meaning to the phrase. For a reference to Chapter 170 of the Laws of 1900—*without the words "as amended"*—would upon established prin-

ciples of statutory construction, have meant Chapter 170 of the Laws of 1900 with all amendments and additions thereto that had been made up to the time the Referendum Law was passed.

Panama R. R. Co. vs. *Johnson*, 264 U. S., 375, 391-2;
Board of Excise vs. *Curley*, 9 Abb. N. C., 100 (Ct. of Appeals), 69 N. Y., 608;
Mundy vs. *Excise Commissioners*, 9 Abb. N. C., 117, 120;
Steele vs. *Village of River Forest*, 141 Ill., 302, 306.

The construction of "as amended," which appellees proposed and the Court below adopted thus makes the phrase superfluous and meaningless.[1]

B.

The attempt to find fault with the reappropriation of 1928[2] is trivial and futile. The objection taken is based on the provision of Article III, Section 21 of the New York Constitution that "every law,"

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[1]The Statutory Court gave no authority for its construction of "as amended." Judge Manton fell back—citing a decision of a single judge of the New York Supreme Court at Trial Term—on the general assertion that the "basic requirements" of referendum laws cannot be changed by later legislative enactments (R., 93). We have shown that the only tenable construction of the Referendum Act itself and of the "as amended" phrase in that Act, is one which makes it unnecessary to debate that question. But it has been expressly decided in New York that subsequent Legislatures may modify the details of the general project (*Kibbee* vs. *Lyons*, 202 App. Div., 562, 566; aff'd 235 N. Y., 546; *People ex rel. Jordan* vs. *Wotherspoon*, 94 Misc., 419, aff'd 176 App. Div., 947). For it is the general project, not the details and mechanics of execution, upon which the people vote. (See *e. g.* the question framed for the people in the 1924 Referendum Act, infra, p. 55.)

[2]N. Y. L., 1928, ch. 75, part 5; Appendix, p. 53.

> "making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

The sole objection appellees take (R., 8) and, of course, the only objection the Court below took (R., 93-4) is that there is a failure "to specify the object to which the sum appropriated is to be applied." The object is stated in the reappropriating statute as "the *State Park System* Fund."[1] And that is the way the object of the Referendum Act was designated in that Act itself. The proposition submitted to the People was[2]:

> "Shall chapter (here insert the number of the chapter) of the laws of nineteen hundred and twenty-four, entitled 'An act making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified *state park system* for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four.' be approved?"

Now a referendum act is subject to the identical requirement, or rather a more stringent requirement,—that it "*distinctly* specify" its "single object" (New York Constitution, Article VII, Section 4). If appellees were right in their view that the specification of the object in the Reappropriation Act of 1928 is insufficient, it must

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[1]Appendix, p. 53.

[2]Appendix, p. 40.

follow that the Referendum Act was void. But everybody agrees — the Governor and the Attorney General; the Chairmen of the financial committees of the Legislature and the Legislature as a whole; the Court of Appeals (*Pauchogue Land Corp.* vs. *Long Island State Park Commission*, 243 N. Y., at 25); appellees themselves (R., 7)—that the Referendum Act was in all respects valid.[1]

Judge Manton was then wholly wrong in holding that there was the least imperfection in the reappropriation of 1928. But appellees' point would have been futile even if the objection to the reappropriation had been well founded. For the question is as to the availability of funds. The funds would have remained available if there had been *no* reappropriation. For the funds were funds which the people of the state had voted, in accordance with Article VII, Section 4 of the New York Constitution. And that section, after prescribing the procedure necessary for the creation of state debts by the Legislature, further provides that

> "The money arising from any loan creating such debt or liability *shall be applied to the work or object specified in the act authorizing such debt or liability or for the payment of such debt or liability, and for no other purpose whatever.*"[2]

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[1]A common practice of the New York Legislature is to do what in this case was done,—to make an original appropriation, item by item and at the end of two years to reappropriate the whole of the unexpended balance.

The item in the appropriation act of 1928 (Appendix, p. 53) just before the "State Park System Fund" item and just after the "Palisades Interstate Park Fund" item, supplies a perfect illustration. That item is the "State Institutions Buildings Fund" reappropriation of $11,956,420.08. The act of *original appropriation* (L., 1926, Ch. 769) had divided the buildings fund among 16 different institutions. But the *reappropriation* was simply of the total unitemized, unexpected balance.

[2]Appendix, p. 6.

Consequently all money derived from the bond issue of 1924 as soon as it came into the State Treasury became a part of the State Park System Fund, and it could not be diverted by the legislature to any other purpose or object, whether subsequent reappropriations were in proper form or not.

For a good statement that the proceeds of state bonds authorized by a referendum after once being appropriated by the Legislature can never be diverted to any other purpose, see *State* vs. *Dixon*, 59 Mont., 58.

The two contentions we have refuted underly appellees' whole case. In the language of appellees' own brief in the court below (p. 19), "save for Article I, Section 6 [the New York due process clause] the provisions of the state constitution hereinafter invoked, occupy in this case the position of facts in the chain of causation which bring the Fourteenth Amendment into operation."

These preliminary questions of state law which must be ruled in appellees' favor before there could arise even the unsubstantial Federal question urged are so obviously without merit, that it cannot be assumed the New York courts would sustain appellees' contentions.

And even if the questions under the State Constitution and statutes were difficult, as in fact we have seen them to be simple, there would still be no basis for jurisdiction. For the Federal Courts cannot lay the basis for their own jurisdiction by deciding preliminary questions of state law—which have not yet come before the state courts (compare *Gilchrist* vs. *Interborough Co.*, 279 U. S., 159, 207)—in such a way as to present a federal question (*New Orleans* vs. *Benjamin*, 153 U. S., 411; for a particularly good statement, see *Levy* vs. *City of Shreveport*, 28 Fed., 209, 214, and compare cases *infra*, p. 65).

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POINT IV.

Appellees are not injured by having their compensation paid out of funds derived from the bond issue of 1924. They are therefore without standing to raise the questions of New York law on which they predicate their so-called Federal question.

Appellees, who have sought and obtained from the Federal Court an adjudication that the reappropriation of the State Park System fund in 1928 was invalid (R., 94), and that the use of moneys derived therefrom to pay them for their property would be contrary to the provisions of the Bond Issue Act and to Article VII, Section 4 of the State Constitution (R., 82, 93) are without standing to raise this point:

Appellees would suffer no injury, and consequently their rights could suffer no infringement, by having their compensation paid out of the bond issue moneys. Only those who are injured by the enforcement of a statute can successfully attack its constitutionality (*Southern Railway Co.* vs. *King*, 217 U. S., at 534).[1] "One who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional" (*Plymouth Coal Co.* vs. *Pa.*, 232 U. S., 531, 544).

One to whom payment is to be made pursuant to statute cannot be heard to say that the statute *deprives* him of property without due process of law.

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[1]Among many applications of the principle see

Hatch vs. *Reardon*, 204 U. S., 152, 160;
Stearns vs. *Wood*, 236 U. S., 75, 78;
Texas vs. *Interstate Commerce Comm'n*, 258 U. S., 158, 162;
Willing vs. *Chicago Auditorium*, 277 U. S., 274, 288, 289-90;
United Gas Co. vs. *R. R. Commission*, 278 U. S., at 310;
Williams vs. *Riley*, 50 Sup. Ct. Rep., 63, decided Nov. 25, 1929.

That the rule in New York is the same, see

Schieffelin vs. *Komfort*, 212 N. Y., 520, 533 and cases cited;
Lange's Creamery, Inc., vs. *City of Niagara Falls*, 251 N. Y., 343 (1929).

POINT V.

The bill of complaint does not even allege the facts necessary to present the unsubstantial question of due process upon which jurisdiction was invoked. It fails to show that the funds available for appellees' compensation at the time of the entry and appropriation were even upon appellees' own theory inadequate. Nor does it show any obstacle to the use of moneys derived from the bond issue of 1924 other than appellees' own objections.

The jurisdiction of the Federal Courts cannot be based upon a question purely hypothetical.

The facts essential to the presentation of the Federal question upon which it is sought to invoke the jurisdiction of the Federal Court must appear by the allegations of the bill of complaint (*Western Union Tel. Co.* vs. *Ann Arbor R. R. Co.*, 178 U. S., 239, 243-4; *Arkansas* vs. *Kansas & Texas Coal Co., etc.*, 183 U. S., 185, 188-9; *Louisville & Nashville R. R. Co.* vs. *Mottley*, 211 U. S., 149, 152; *Chappell* vs. *Waterworth*, 155 U. S., 102, 108). And these facts must be alleged "according to the rules of good pleading" (*Hull* vs. *Burr*, 234 U. S., 712, 720; *Southern Ry. Co.* vs. *King*, 217 U. S., 524, 536; *Arbuckle* vs. *Blackburn*, 191 U. S., 405, 413), not by mere inference (*Hanford* vs. *Davies*, 163 U. S., 273, 279-80, or by the statement of legal conclusions (*Gold-Washing & Water Co.* vs. *Keyes*, 96 U. S., 199, at 202, 203).

The supposed absence of an antecedent appropriation in an amount reasonably sufficient to pay for plaintiffs' property is the sole premise of the due process question appellees sought to raise, and upon which the District Court assumed jurisdiction.

But the existence of this premise is not shown by the allegations of the bill. It is not shown what just com-

pensation will amount to, it is not shown what appropriations the Commission had on hand or what resources:

1. *The bill of complaint fails to show what just compensation will amount to, or that it will exceed* $500,000.

(a) The bill contains a *general allegation* that the real property *and* the leasehold are "of the value at present in excess of $3,000,000" (R., 8).

But the existence of the leasehold cannot increase the total amount recoverable; it can affect only the apportionment of a Court of Claims judgment between owner and lessee. (Lewis, *Eminent Domain* [3d ed.], p. 1253; *Matter of William and Anthony Streets,* 19 Wend., 678.)

(b) The *specific references* of the bill are to appellees' capitalization (R., 9), to the deposit of trap rock and the plans to develop the property as a quarry (R., 4, 5), and to the lease and other agreements supplemental thereto (R., 5, 19-30) in which an annual royalty based on the capacity of the contemplated plant takes the place of an agreed rental (R., 12, 13, 23-8).

"Limiting the general statement by the specific, in accordance with the context" (*Merritt & Chapman Co.* vs. *U. S.,* 274 U. S., 611, 612), we must accordingly take the $3,000,000 figure as including the estimated future profits and value of the quarry in operation.[1] But the future profits even of a going concern cannot, unless the statute so declares, be included as an element of just compensation.

Banner Milling Co. vs. *State,* 240 N. Y., 533, c. d., 269 U. S., 582;
Joslin Co. vs. *Providence,* 262 U. S., 668, 675;
Mitchell vs. *U. S.,* 267 U. S., 341.

[1]This construction is confirmed by appellees' affidavits (R., 36-7, 43, 44, 46, 48-9, 50-1, 53; see p. 15, supra).

Still less can the profits or value of a business not yet in operation be recovered.

> *N. Y. Central R. Co.* vs. *Maloney,* 234 N. Y., 208, 217;
> *Orleans County Quarry Co.* vs. *State,* 172 App. Div., 863, 865-6[1].

(c) Other specific allegations of the bill are as to the value of *personal* property and the amount of commitments for personal property (R., 6-7).

But the appropriation papers attached to the bill show (R., 34-5; compare 63, 64-75) that the State appropriated only the *real* property and is, therefore, not liable for any personal property nor for the depreciation in value of personal property (*People* vs. *Johnson & Co.,* 219 App. Div., 285; aff'd 245 N. Y., 627; c. d., 275 U. S., 571).

(d) And the bill does not even allege the value of the personal property actually on the premises at the time

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[1]This opinion exposes the very fallacy into which appellees have fallen —of estimating the value of "the land appropriated by figuring the probable amount of stone in the ground and giving the claim that value" (compare R., 36, 46, 53). In reversing an award of the Board of Claims rendered upon that basis Judge John M. Kellogg said:

> "There is no limit to the value of a quarry, or sand bank, or clay bank, if an estimate can be made of the amount of stone, sand or clay which can be taken and a fixed price put upon it. Such computation ignores to quite an extent the loss and contingencies of the business. The Board should properly take into consideration the nature of the property, that it is in a locality where there are valuable quarries, and that there are quarries upon it, and that it has a value greater than farming lands, and should give consideration to the evidence as to the quality and quantity of the stone which may be quarried, but the fact remains that there are many quarry lands in the locality, and such lands have only been sold by the acre, and if all the quarry land in Orleans county can be sold by fixing the value of the stone *in situ*, the wealth of the county is beyond reasonable estimation."

of the entry and appropriation (R., 5-6). Nor does it allege that no personal property has been removed by appellees (R., 7). (The significance of the omission appears by the affidavit of appellant White, showing that after the service of the notice of entry and appropriation "certain movable property and equipment" was "removed from the premises" [R., 62].)

The bill thus shows on its face that appellees cannot recover $3,000,000 in the Court of Claims, and utterly fails to show what they can recover.

2. *It is admitted that* $3,500,000 *was appropriated in* 1926, *and it is not alleged that any part of this appropriated fund had been expended before appellees' property was taken.*

It stands admitted on the face of the bill that in 1926 the New York Legislature had put $3,500,000 at the disposal of the Palisades Interstate Park Commission, and that about two weeks before the adoption of the revised Conservation Law of 1928,[1] under which the entry and appropriation was made, the New York Legislature "purported to reappropriate the said sum" (R., 8).

The bill of complaint does not allege that any part of the $3,500,000 had been expended before the entry and appropriation.

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[1]The 1928 reappropriation law (N. Y. L., 1928, ch. 75, part 5) became effective February 17, 1928 (see Appendix, p. 53).

The revised Conservation Law (N. Y. L., 1928, ch. 242 became effective March 5, 1928 (see p. 3, *supra*).

The entry and appropriation took place on October 11, 1928 (R., 7).

3. *The bill of complaint alleges that* $500,000 *out of the* $3,500,000 *appropriation was allocated to the acquisition of appellees' property before the property was taken.*

This alleged allocation (R., 6) is not shown by the bill to be insufficient, because (as we have seen) the value of the property is not shown.

And we know that the allocation in no way limited the obligation of the State or the pledge of its credit. It was merely a tentative preliminary estimate on the part of the executive and financial officers, whose duty it was to pass on the project, of the probable cost to the State.

4. *The bill of complaint does not show that any doubt has ever been raised, except by appellees themselves, as to the legality of using the* 1924 *bond issue money to pay for appellees' land or as to the validity of the reappropriation act of* 1928 *or of the allocation.*

Appellees' claim that the allocation of moneys derived from the bond issue of 1924 was illegal (R., 7, 9), and their further claim that the 1928 reappropriation for the use of the Palisades Interstate Park was invalid (R., 8, 9), are not put upon any ruling of the New York Court of Claims or of any New York court or of any administrative or executive officer of the State.

What the bill shows, on the contrary, is that the Governor of New York, the State Council of Parks, the Conservation Commissioner, and the Chairmen of the two financial committees of the Legislature all concurred with the Palisades Interstate Park Commission in treating the bond issue moneys as validly appropriated, and available to pay for the land taken by entry and appropriation. And the bill of complaint further shows that the Attorney General—the chief law officer of the State who alone could raise the question (compare Cullen, C. J., in *County*

of Albany vs. *Hooker*, 204 N. Y., 1, 19)—joins with all the other appellants in asserting the validity of the entry and appropriation. He appears in opposition to the suit, is joined as a defendant and is enjoined by the decree.

5. *It is not alleged that no funds were available outside of moneys derived from the bond issue of* 1924.

It is not alleged that the state park system fund derived from the bond issue of 1924 is the only source from which funds had been appropriated for the use of the Palisades Interstate Park Commission before appellees' land was appropriated.

Nor is it alleged that the so-called $500,000 allocation —shown by an exhibit to the bill to be in reality a $600,000 allocation (R., 34-5)—was the only fund the Commission had on hand.

Here again the significance of the omissions appears from the affidavits in opposition. For, as we have seen, these affidavits show that on October 11, 1928, the commission had other moneys, securities and property on hand amounting to more than $500,000, all of which "could be lawfully used for the acquisition of lands for park purposes in any manner" (R., 79).

The Federal question upon which jurisdiction was asked and assumed is thus not actual and present,—merely hypothetical.

Neither the absence of an appropriation adequate to pay for the property, nor any lack of funds whatsoever is shown by the allegations of the bill. The utmost that appears is that *if* the reappropriation of 1928 and the use of the bond issue moneys were to be attacked and the attack sustained by the New York courts, *then* (if it

can be further assumed—without being alleged and contrary to the fact—that no other funds were available), in that future and conjectural event there *might* arise some question of inadequacy of funds.

On no such showing can jurisdiction be based. "The judicial power extends to all cases in law and equity arising under the Constitution, *but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis*" (Fuller, C. J., in *New Orleans* vs. *Benjamin*, 153 U. S., 411, 424—our italics).

To the same effect are

Shreveport vs. *Cole*, 129 U. S., 36, 42;
Defiance Water Co. vs. *Defiance*, 191 U. S., 184, 193, 194;
Levy vs. *City of Shreveport*, 28 Fed., 209, 214;
McCain vs. *Des Moines*, 174 U. S., 168, 176-7, 181.

Chief Justice Fuller, in the *Benjamin* case, referring to allegations of the bill in principle exactly like the allegations here, said (p. 430):

> "Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies and tax collections, and that the state courts would so decide. And the bill made no such specific averment, with which, indeed, many of its allegations were wholly inconsistent."

POINT VI.

Injunction is not the remedy to recover the possession of real property. It follows that the bill is without equity and the case therefore beyond the jurisdiction of the Statutory Court, and further that the case is outside the jurisdiction of the Federal Courts altogether. For a plaintiff's case in ejectment can present no federal question.

A.

Appellees were out of possession when they brought their suit, and had been for five months, as their bill of complaint admits (R., 7, see also 43).

They asked in their bill that the officers of the State be restrained from "in any way enforcing or attempting to enforce" the provisions of Part 9 of the 1928 Conservation Law and the notice of entry and appropriation served thereunder (R., 10, 9). But there was no enforcement of the act or of the notice *in prospect* when appellees brought their suit. Possession had been taken when the notice of entry and appropriation was served (R., 7).

The only *prospective* relief appellees asked was that appellants be enjoined "from *continuing* in possession of plaintiffs' said property" (R., 10),—in other words that appellees themselves be *restored* to possession by injunction.

The relief asked under the guise of an equity bill and prayer for injunction is thus nothing more or less than the relief a judgment in ejectment would give. The equity jurisdiction of the federal courts does not extend to such a case.

United States vs. *Wilson*, 118 U. S., 86;
Whitehead vs. *Shattuck*, 138 U. S., 146;
Lacassagne vs. *Chapuis*, 144 U. S., 119;
Black vs. *Jackson*, 177 U. S., 349, 361, 363;
Boston, etc., Mining Co. vs. *Montana Ore Co.*, 188 U. S., 632;

Denison vs. *Keck*, 13 Fed. (2d), 384 (C. C. A., VIII);
Johnston vs. *Corson Gold Mining Co.*, 157 Fed., 145 (C. C. A., IX).

Whitehead vs. *Shattuck* is the leading authority. Plaintiff claimed a title in fee; he brought suit alleging that defendants were in possession and demanding a cancellation of the documents under which defendants claimed, as a cloud upon his title. This Court affirmed a judgment dismissing the bill. Mr. Justice Field said (138 U. S., at 151):

> "Where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

In *Lacassagne* vs. *Chapuis* a bill for injunctive relief was dismissed because the basic demand was the precise demand in reality made here,—that plaintiff be restored to possession. Mr. Justice Blatchford said (144 U. S., at 124):

> "The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to *restore* the plaintiff, by injunction, to rights of which he *had been* deprived. The function of an

> injunction is to afford *preventive* relief, not to redress alleged wrongs which have been committed already. *An injunction will not be used to take property out of the possession of one party and put it into that of another.*" (Our italics.)

Nothing is pleaded to take the case out of the rule. Inadequacy of legal remedy is the test of equity jurisdiction,—"the only test of jurisdiction" in the Federal courts (*Payne* vs. *Hook*, 7 Wall., 425, 430; *McConihay* vs. *Wright*, 121 U. S., 201, 206; *Indiana Mfg. Co.* vs. *Koehne*, 188 U. S., 681, 690) and the test applied in this class of cases (*Lancaster* vs. *Kathleen Oil Co.*, 241 U. S., 551, 555)—and there is nothing in the bill to show that the legal remedy of ejectment is inadequate. The only "irreparable" damage alleged is said to be caused by appellants' "continued unlawful occupation" and by "impossibility of operation" (R., 8). There is nothing alleged that even suggests that the officials of the State of New York, who are the defendants, would dispute title and right to possession in the face of a judgment against them in ejectment.[1]

B.

That the bill shows no ground of *equity* jurisdiction is fatal to the jurisdiction of the Statutory Court,—to the jurisdiction of any federal court of *equity*. That the suit in reality is in ejectment defeats the jurisdiction of the Federal Court even on the *law* side. For an ejectment action is not one arising "under the Constitution

---

[1]Judge Manton said that the action is not "one for ejectment" (R., 96) and cited

Hopkins vs. *Clemson College*, 221 U. S., 636;
U. S. Freehold Land Co. vs. *Gallegos*, 89 Fed., 769.

Both of these were cases of continuing interference with the water rights of owners who remained in possession, and held merely that injunction would lie to restrain the continuing trespass.

or the laws of the United States," and in the absence of diversity of citizenship an ejectment action will not lie in the Federal Courts.

> *Taylor* vs. *Anderson*, 234 U. S., 74;
> *Deere* vs. *State of New York*, 22 Fed. (2d), 851 (D. C., N. D., N. Y.);
> *Florida Central, etc., R. R. Co.* vs. *Bell*, 176 U. S., 321, 325;
> *Joy* vs. *City of St. Louis*, 201 U. S., 332, 340.

"It is the settled interpretation of these words," as used in the jurisdictional statute,

> "that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." (*Louisville & Nashville R. R.* vs. *Mottley*, 211 U. S., 149, at 152.)

Taylor vs. *Anderson* and *Deere* vs. *State* are exactly in point. Those were ejectment cases, and the ruling was that the federal court was without jurisdiction although the plaintiff in each case alleged—anticipating a defense—that defendant's claim of title was defeated by a federal enactment.

The jurisdictional test is indeed even stricter than that supplied by the statement quoted and the illustrations

given. It is not only in the plaintiff's statement of his own case, it is in his statement of the facts *essential* to his case, that the Federal question which will support jurisdiction must be found. And since in an ejectment action it is not incumbent upon the plaintiff to state the source of his title, he cannot, even by pleading that the Federal Government was the source, give jurisdiction to the Federal courts,—as this Court flatly decided in *Florida Central R. R.* vs. *Bell* and *Joy* vs. *City of St. Louis*. In the *Joy* case Mr. Justice Peckham said (201 U. S., 332, 340):

> "The general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question."

Why, in the face of all these clear objections to the federal jurisdiction, did appellees bring this case into the Federal Courts? Solely because the decisions of the appellate courts of New York so recently rendered in the *Pauchogue* and *Flagg* cases made manifest the hopelessness of litigation in those courts. But one cannot claim the jurisdiction of the Federal Courts for the sole reason that he must lose upon state issues in the state courts.

POINT VII.

The considerations already advanced show that the bill is, on its face, without merit and should on that ground too have been dismissed.

The considerations we have developed in their jurisdictional aspect—that the federal question urged has been foreclosed by repeated decisions of this Court; that appellees' contentions upon the preliminary questions of state law are groundless and appellees without standing to urge these contentions; that the bill of complaint merely simulates an equity suit for injunctive relief, asking nothing, and showing the need of nothing, that ejectment would not give—are all equally conclusive against the merits.

And these objections to the merits of the bill are all open here. This Court's power of review, as Mr. Justice Van Devanter said in *Denver* vs. *New York Trust Co.* (229 U. S., 123, 136):

> "is not confined to the act of granting the injunctions, but extends as well to determining whether there is *any insuperable objection,* in point of jurisdiction *or merits,* to the maintenance of either bill, and, if so, to directing a final decree dismissing it. *Smith* vs. *Vulcan Iron Works,* 165 U. S., 518, 525; *Mast, Foos & Co.* vs. *Stover Manufacturing Co.,* 177 U. S., 485, 494; *Harriman* vs. *Northern Securities Co.,* 197 U. S., 244, 287; *United States Fidelity & Guaranty Co.* vs. *Bray,* 225 U. S., 205, 214." (Our italics.)

POINT VIII.

The decisions of a century certify the sufficiency of Conservation Law, Section 59 under the due process and just compensation clause of the New York Constitution, and the Statutory Court manifestly erred in holding to the contrary.

The decree actually adjudges Section 59 to be in violation of the *New York* due process and just compensation clause—Article I, Section 6 (R., 82). Leading New York cases show the completeness of this error.

The *Adirondack Railway* litigation involved, as we know, a provision of the Adirondack Park Act, indistinguishable from Section 59, and upon which Section 59 was based. We have seen what this Court said about the assurance of just compensation which the Adirondack legislation gave. This is what Judge Vann of the Court of Appeals said (*People* vs. *Adirondack Ry. Co.*, 160 N. Y., 225, at 241):

> "All the canals of the state were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the state. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they re-

ceived the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation, and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock* vs. *Young*, 4 Wend., 647; *Jerome* vs. *Ross*, 7 Johns. Ch., 315; *Rogers* vs. *Bradshaw*, 20 Johns., 735.)"

Judge Manton actually cited the first *Pauchogue* decision—of the second he made no mention—as *supporting* his conclusions (R., 95, 96). This is what Judge Pound, writing for the unanimous Court of Appeals, said of the constitutional question in the first *Pauchogue* decision (243 N. Y., at 24):

"The power of the State to appropriate private property for public use can be held subject to no further limitation than that the statute under which the property is taken shall recognize on the taking of the property the absolute right of the owner to just compensation and make provision for the prompt determination and payment of such compensation from the public funds. (*Kahlen* vs. *New York*, 223 N. Y., 383, 389.) We may assume that compensation need not be specifically provided by an appropriation of moneys therefor before the property is appropriated. The faith of the State may be ample security if it opens the door to the claimant to obtain the obligation of the State to pay. It may be assumed that it will faithfully meet its obligations thus established. A judgment of the

> Court of Claims assessing damages on which the Comptroller shall issue his warrant for payment of the amount due the claimant with interest to be paid by the Treasurer may sufficiently guarantee the constitutional right to just compensation. Otherwise, the State might not be able to act in an emergency to take property for purposes of public defense or health or other great public needs. No needless limitations should be placed on the power of the State."

Of the long line of New York decisions in accord, we may mention

> *Matter of Mayor*, 99 N. Y., 569 (cited for "the rule in New York" by this Court in *Adirondack Ry. Co.* vs. *N. Y.*, 176 U. S., 349-350);
>
> *Kahlen* vs. *State of New York*, 223 N. Y., 383 (opinion by Pound, J., citing at 389 *Sweet* vs. *Rechel* and *Crozier* vs. *Krupp*, and itself cited in 243 N. Y., at 24, supra);
>
> *Rogers* vs. *Bradshaw*, 20 Johns., 735, 744-45 (opinion by Kent, C., in 1823, cited by this Court in *West River Bridge Co.* vs. *Dix*, 47 U. S., 507, 542, and *Sweet* vs. *Rechel*, 159 U. S., at 406);
>
> *Jerome* vs. *Ross*, 7 Johns. Ch., 315 (Kent, C.).

As it is thus wholly clear that the Statutory Court misconceived the rule of due process and just compensation settled for a century in the New York Courts, we may pass rapidly over particular errors. It should, however, be noted that it is on the authority of *Sage* vs. *City of Brooklyn* (89 N. Y., 189) that the Statutory Court declared that Subdivision 7 of Section 59—the subdivision carrying the *express* promise of the State —"adds nothing by way of a pledge of faith and credit"

(R., 97). Chief Judge Andrews, in the *Sage* case, said just the opposite (p. 196):

> "The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law."

Of *Newell* vs. *People* (7 N. Y., 9) the only other New York authority to which the Statutory Court made allusion (R., 96), it is sufficient to say that the case involved no question of due process and is absolutely irrelevant to any issue in this litigation.

POINT IX.

The interlocutory decree is not confined to preserving the status quo. It gives appellees all the relief that a final decree in their favor could give.

We have shown that the District Court assumed jurisdiction upon a Federal question that was put at rest many years ago, and upon premises of state law that are groundless and hypothetical, and we have shown that it entertained as a bill in equity a pleading that has nothing of equity about it except the phraseology of the prayer for relief. Having thus erroneously assumed jurisdiction and taken equitable cognizance of the case, the court below then granted the decree from which this appeal is taken, a decree purporting to grant *interlocutory* relief, but in reality giving appellees what a *final* decree in their favor would give—possession and unrestrained control of the property.

The Statutory Court imposed no check upon the exercise of appellees' dominion over the property pending the final determination and thus put it within their power to ruin it for park purposes. Observe the sweeping language of the so-called interlocutory decree:

Defendants are enjoined not only "from continuing in possession of plaintiffs' said property" (R., 83), but even (R., 86) "from doing any acts or things as aforesaid which may in any respect interfere with the ownership or possession of the plaintiffs of the aforesaid property or their free use and enjoyment thereof."[1]

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[1]The practice in the Southern District of New York is for a decree granting an interlocutory injunction to be settled upon notice pursuant to Southern District Rule xxx.

The decree was settled without notice. Pointing out the error, defendants below in briefs and oral argument before the Presiding Judge, urged a modification of the decree. But the Statutory Court declined to change it in any particular.

"The sole object of an interlocutory injunction is to preserve the subject under controversy in its then condition, and without determining any question of right, merely to prevent the further perpetration of wrong or the doing of any wrong whereby the right under controversy may be materially injured or endangered" (I High, *Injunctions* [4 ed.], Section 4). And such is the rule of this Court (*Lawrence* vs. *St. Louis-San Francisco Ry. Co.*, 274 U. S., 588, 594; *Erhardt* vs. *Boaro*, 113 U. S., 527). It follows that an interlocutory injunction

> "cannot be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done, since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo.*" (High, *Injunctions*, ibid.)

"A rule of law cautions us to proceed with great deliberation where the injunction *pendente lite* will in effect determine the litigation, and give the party seeking the relief the entire relief which is prayed for in the decree," said Judge Manton, writing for the Court of Appeals for the Second Circuit in *American Mercury* vs. *Kiely* (19 Fed. [2d], 295, 297) and citing abundant authority. This "rule of law" his opinion in this case overlooks.

An interlocutory decree that "will permit one party to obtain any advantage by acting, while the hands of the adverse party are tied by the writ," is "an abuse of judicial discretion" (*Spring Valley Water Co.* vs. *City & County of San Francisco*, 165 Fed., 667, 709).

> *In re Arkansas R. R. Rates*, 168 Fed., 720, 723;
> *Lawrence* vs. *St. Louis-San Francisco Ry. Co.*, *supra;*
> *Ramapo Mts. Water, Power & Service Co.* vs. *Commissioners of Palisades Interstate Park*, 177 App. Div., 700, 705.

The error of granting such an interlocutory injunction is gravest where, as here, it is the right and interest of the public that is imperiled. In the recent case of *Lawrence* vs. *St. Louis-San Francisco Ry. Co.* this Court reversed an interlocutory decree which, by failing to preserve the *status quo* pending the hearing of the merits, "exposed the city and its citizens to danger of irreparable loss" (274 U. S., at 594).

And gravest of all is the error of granting final relief by interlocutory decree when there is lack of jurisdiction, lack of merit and lack of equity,—any one of these an "insuperable objection" to the "maintenance of the bill" (*Denver* vs. *New York Trust Co.*, *supra*, p. 71).

In addition to all the considerations demanding the dismissal of the bill and therefore the denial of the interlocutory injunction as matter of right, there is present every circumstance that this Court found controlling as mere matter of discretion in *Cavanaugh* vs. *Looney* (248 U. S., 453, 456-457):

"No such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young* [209 U. S., 123, 166]. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

"When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened 'irreparable loss and damage' appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review here is obvious."[1]

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[1]The New York Appellate Division, in an unanimous opinion by Judge Blackmar, reversed an order of temporary injunction against the Palisades Park Commission in *Ramapo Mts. Water, Power & Service Co.* vs. *Commissioners*, supra. Judge Cropsey and Judge Callaghan, in the only cases of the sort that arose after the principles of the subject had been settled by the first *Pauchogue* opinion in the Court of Appeals, sharply denied applications for interlocutory injunctions against the Long Island Park Commission (*Flagg* vs. *Long Island State Park Commission*, N. Y. L. J., Aug. 3, 1926; *Rasweiler* vs. *Long Island State Park Commission*, N. Y. L. J., April 29, 1927).

CONCLUSION.

The Statutory Court ruled that the State Legislature must make, in advance of the taking of any piece of real property, a "separate appropriation in such an amount as to be reasonably certain to cover an award which may reasonably be made for said land." The practical result of the decision is to deprive the State of the most used and most efficient method of exercising its power of eminent domain.

The three judges not only held, in the face of all the rulings of this Court and of the New York Court of Appeals, that the State's promise to pay contained in Section 59 of the Conservation Law is insufficient,—they went further. They declared it an essential of due process that, before a state takes land by entry and appropriation, there shall be "funds *separately* appropriated by the legislature of said state in such an amount as to be reasonably certain to cover an award which may reasonably be made *for said lands*" (Decree, R., 82; also Opinion, R., 93, 95).

This would mean that, in every instance, the Legislature would have to act in advance upon, and appropriate money for, not merely the project, but every particular piece of property. And in practical consequence it would also mean that unless the Legislature set aside in advance funds equal to *the owner's estimate* of the value of his property, the owner could always retake the property by an injunction suit like this in the federal courts.

Under these restrictions, the State could never employ the entry and appropriation process. The restrictions would make it—instead of a summary method, and the most efficient—the most cumbersome as well as the most expensive method imaginable.

No particular piece of property could be appropriated until the questions whether to take it and how much the owner might recover for it in the Court of Claims, had been brought before the Legislature and been the subject of consideration and decision there. Entry and appropriation would become not an administrative, but a legislative, procedure.

And huge amounts would have to be impounded out of the State funds. For there is notoriously a wide discrepancy between the owner's estimate of the value of property in eminent domain and the estimate of the State's officials.[1] The same discrepancy is naturally to be expected between the owner's estimate and the Court of Claims judgment.

Moreover, with the adoption of this so-called constitutional requirement the owner's estimate would in practical effect control: The Legislature's appropriation, however liberal, would never come up to the owner's expectations,—and the validity of the taking in every instance would be at the mercy of the owner's demands.

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[1]See for instance

Pauchogue vs. *Long Island State Park Commission*, 248 N. Y., 635, c. d., 278 U. S., 657,
where the ratio was 3 to 1;

Flagg vs. *Moses*, 132 Misc., 494, aff'd 225 App. Div., 887, leave to appeal denied by N. Y. Ct. of Appeals, Apr. 23, 1929, supra, pp. 38-39,
where the ratio was 6 to 1;

Matter of Middletown, 82 N. Y., 196, 200,
where the ratio was 10 to 1.

In the very case of the acquisition of a Hudson River quarry by the Palisades Commission, the owners of the fee and the quarry company which held the leasehold, made claims in excess of $50,000,000; the condemnation commissioners awarded to these interests a total of $570,000; the courts sustained the award (*Matter of Commissioners of Palisades Interstate Park*, 164 App. Div., 957; the figures appear in the Case and Points on Appeal).

If this decision stands, every entry and appropriation threatens a litigated case.

It was in New York that the entry and appropriation practice had its origin,—in the Erie Canal Act of 1817.[1] After the legislation had been in effect for a generation the New York courts called it "the first efficient statute under which our great system of internal improvements was commenced" (*Rexford* vs. *Knight*, 15 Barb., 627, 642, affirmed 11 N. Y., 308). After a century of use in the acquisition not of canal properties only but in the up-building of a state land system of a million acres, the Court of Appeals quoted and repeated this characterization (*Kahlen* vs. *State of New York*, 223 N. Y., 383, 389). The decision of the Statutory Court, were it to stand, would mean the end of the practice.

[1] N. Y. L., 1817, ch. 262.

The interlocutory decree should be reversed, and the bill dismissed for lack of equity, lack of merit and lack of jurisdiction.

Respectfully submitted,

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WALTER H. POLLAK,
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On the Brief.

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DEC 2
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO BRIEF FOR APPELLANTS.

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CONTENTS OF APPENDIX.

	PAGE
Judicial Code, Section 266	1
New York Constitution:	
Article I, Section 6	3
Article I, Section 7	3
Article III, Section 19	4
Article III, Section 21	4
Article VII, Section 4	5
Palisades Interstate Park Act of 1900	7
Ch. 242 of the Laws of 1928:	
Section 1	21
Section 5	21
Section 41	27
Section 50	35
Section 51	35
New York Conservation Law of 1928:	
Section 50	22
Section 59	23
Section 662	27
Section 745	28
Section 746	28
Section 747	29
Section 748	30
Sections 749-759	33
Section 760	34
Section 761	34

PAGE

1924 Bond Referendum Act 36
1926 Appropriation Act 41
1928 Appropriation Act, Part V, Section 5 53

General Construction Law:
Section 80 54
Section 95 54

Court of Claims Act:
Section 1 55
Section 2 55
Section 10 56
Section 11 56
Section 12 56
Section 14 57
Section 17 58
Section 25 58
Section 28 60
Section 28-a 60
Section 29 61

State Finance Law:
Section 49-b (former Section 51) 63

APPENDIX.

Judicial Code

Section 266

(U. S. C. A., §380)

Alleged unconstitutionality of State statutes; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss

or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, §17, 36 Stat., 557; Mar. 3, 1911, c. 231, §266, 36 Stat., 1162; Mar. 4, 1913, c. 160, 37 Stat., 1013; Feb. 13, 1925, c. 229, §1, 43 Stat., 938.)

CONSTITUTION OF STATE OF NEW YORK.

Article I, §6:

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on presentment or indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Article I, §7:

When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by the Supreme Court with or without a jury, but not with a referee, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. The use of property for the drainage of swamp or agricultural lands

is declared to be a public use and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.

The Legislature may authorize cities and counties to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased.

Article III, §19.

The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

Article III, §21:

No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly

specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

Article VII, §4:

Except the debts specified in sections two and three of this article, no debt shall be hereafter contracted by or in behalf of this state, unless such debt shall be authorized by law, for some single work or object, to be distinctly specified therein. On the final passage of such bill in either house of the legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass and ought the same to receive the sanction of the people?" No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election nor shall it be submitted to be voted on within three months after its passage nor at any general election when any other law, or any bill shall be submitted to be voted for or against. The legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law.

Except the debts specified in sections two and three of this article, all debts contracted by the state after January first, nineteen hundred and twenty, pursuant to an authorization therefor, heretofore or hereafter made and each portion of any such debt from time to time so contracted irrespective of the terms of such authorization, shall be paid in equal annual instalments, the first of which shall be payable not more than one year, and the last of which shall be payable not more than fifty years, after such debt or portion thereof shall have been

contracted. No such debt hereafter authorized shall be contracted for a period longer than that of the probable life of the work or object for which the debt is to be contracted, to be determined by general laws, which determination shall be conclusive.

The legislature may from time to time alter the rate of interest to be paid upon any state debt which has been or may be authorized pursuant to the provisions of this section or upon any part of such debt, provided, however, that the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof which has been or shall be created or issued before such alteration.

The money arising from any loan creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever.

PALISADES INTERSTATE PARK ACT.

Chapter 170 of the Laws of 1900 Including Amendments[1] Prior To Its Re-enactment by L., 1928, Chapter 242.

AN ACT to provide for the selection, location, appropriation and management of certain lands along the Palisades of the Hudson River for an Interstate Park and thereby to preserve the scenery of the Palisades.

Became a law, March 21, 1900, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Within thirty days after the going into effect of this act there shall be appointed by the governor of this state, by and with the consent of the senate, ten commissioners, five of whom shall be citizens and residents of the state of New York, who shall constitute and are hereby appointed and constituted a board of commissioners by the name and style of "commissioners of the Palisades Interstate Park." Of the commissioners first appointed under the provisions of this act, the terms of two (one of whom shall be a resident of this state) shall expire each year until the terms of all have expired;

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[1]L., 1906, ch. 691;
L., 1910, ch. 361;
L., 1914, ch. 15;
L., 1915, ch. 562;
L., 1917, chs. 168, 251;
L., 1919, ch. 6;
L., 1920, ch. 283;
L., 1922, ch. 79;
L., 1924, ch. 354.

and the said commissioner first appointed shall be appointed and hold office respectively for the term of one, two, three, four and five years, as indicated and fixed in their respective commissions and until others are appointed in their places, and all such commissioners, after the first appointment shall be appointed by the governor and hold office for the full term of five years and until others shall be appointed in their places; vacancies in the commission caused by death, resignation or refusal to act, or removal from the state shall be filled by the governor by appointment for the unexpired term only. No member of said board shall receive any compensation for his services as commissioner, but each commissioner shall be entitled to receive his actual disbursements for his expenses in performing the duties of his office.

§2. *Powers; officers and employees; facilities; office.* Such board of commissioners, and their successors, are hereby created a body politic, with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings. Such board shall annually choose from among its members a president, a vice-president, treasurer and secretary and appoint such other officers and such other employees, including patrolmen, as it may deem necessary to carry out the purpose of this act, and may employ counsel. The patrolmen so appointed shall be provided with uniforms by the board of commissioners and shall have, within the limits of the property of the Palisades Interstate park, all of the powers, duties and liabilities of constables of towns in the execution of criminal process; and criminal process issued by a police justice or magistrate of a village comprising or containing territory included in such park may be directed to and executed by any such patrolman, notwithstanding the provisions of any local or special act relating to any such village. The board of commission-

ers may also determine the duties and compensation of such appointees and remove them at pleasure, and make all reasonable rules and regulations respecting the same. The board of commissioners may also erect and operate elevators and escalators at such places in the park as the board may deem necessary or expedient and may provide and operate such other facilities, including any and all means of transportation to, from or in said park, for the use and enjoyment of such park by the public and for increasing the accessibility to the park of such public as the board may deem to be necessary or expedient, and the said board may also provide, at its discretion, by a proper rule or regulation, for the terms upon which, and the manner in which, all such facilities may be used. Such board shall have and maintain a suitable office, where its maps, plans, documents, records and accounts shall be kept, subject to public inspection, at such times and under such reasonable regulations as the board shall determine.

§3. The first meeting of such board of commissioners at which it shall choose its officers, as hereinbefore provided, shall be held within thirty days from the going into effect of this act, at such time and place as shall be agreed upon and notified to the members of the board of commissioners by the secretary of state.

§4. The board of commissioners shall have power to and shall, as soon as may be after its organization, proceed to select and locate such lands lying between the top of the steep edge of the Palisades and the exterior bulkhead line established by law upon the Hudson River, together with such separate parcels of unimproved lands lying on the front of the top of the Palisades from the New Jersey state line on the south to Piermont creek, near Piermont in Rockland county, on the north, as may in their opinion be proper and necessary to be reserved

for the purpose of establishing a state park and thereby preserving the scenic beauty of the Palisades; and said board of commissioners shall have the further power, to, and shall, as soon as said board shall deem it feasible and advisable, proceed to select and locate such mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties, north of Piermont creek and south of the city of Newburgh, and other lands to the west thereof and extending into the Ramapo mountains, except the land comprised in the United States government reservation at West Point and the land comprised in the state reservation at Stony Point, and other lands now owned by the state of New York, as may in the opinion of said board of commissioners, be proper and necessary for the purpose of extending the limits of said state park and thereby preserving the scenic beauty of or securing to the use of the public for park purposes the mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties and other lands to the west thereof and extending into the Ramapo mountains north of the Palisades.

§5. *Acquisition of lands; maintenance of park.* The said board of commissioners shall have the power to acquire, maintain and make available for use as a public park, the lands located as aforesaid, and for this purpose shall have power to take in fee or otherwise, by purchase, gift, devise or eminent domain, the said lands, or any of them and any rights, interests and easements therein, and to receive by gift, contribution or bequest moneys to be used in acquiring or improving the said lands or any of them; said board shall also have power to acquire for park purposes by gift or devise, and also by purchase when funds are hereafter made available therefor by the legislature, but not by eminent domain, any lands or rights in lands outside of the areas defined in section four; deeds of conveyance for such lands shall

be made to said board of commissioners by its corporate name, and it shall be the duty of said board to preserve, care for, lay out and improve the said park and to make rules for the use and government of the same, and of such parts of state, county and other public highways as lie along or within the boundaries of such park; a violation of any of such rules shall constitute a misdemeanor and shall be punishable by a fine of not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment, provided, however, that any rules which may apply to any part of any state or county highway shall be subject to the approval of the state commission of highways; said board shall have power also to lay out, construct and maintain roads, pathways and boulevards upon, across and over the said park, to lay out, construct and maintain roads between and connecting any separate portions of said park, and for this purpose to acquire rights of way upon and across any intervening lands, and to lay out, construct and maintain roads and ways connecting the roads and ways within said park with other public roads outside of and adjacent thereto. The said commissioners shall have the power, by proper deed executed in their corporate name, to sell and convey the right, title and interest of the said commissioners and of the people of the state of New York in and to any or all lands in the town of Clarkstown, county of Rockland, previously acquired by them which lie west of the crest of the mountainous lands bordering on the Hudson river in said county and which the said commissioners decide are not necessary or desirable for park purposes. All moneys received from the sale of such lands shall be deposited with the state treasurer and, upon appropriation by the legislature, shall be devoted to the acquisition of other lands for the purposes of said park. The said commissioners may also sell all personal property, supplies, chattels, material and profits a prendre which they decide to be not necessary or de-

sirable for the uses and purposes of the park. All moneys received from the sale of such personal property, supplies, chattels, material and profits a prendre and from the operation of the park shall, notwithstanding the provisions of section thirty-seven of the state finance law, be expended by said commissioners for the extension, development, operation and maintenance of such park in such manner as the commissioners may determine. The amounts received or expended under this section, as amended, shall be reported annually to the state comptroller. The said board of commissioners shall in laying out and maintaining said park have regard to the laying out and maintenance of such park as may be established by the state of New Jersey along the Palisades and Hudson river, and shall, so far as may be, lay out and maintain said park in such manner that it, together with such park as may be established by the state of New Jersey, shall form a continuous park, the intention of this act being to provide, in conjunction with the state of New Jersey, for the establishing of a park along the entire front of the Palisades from Fort Lee, in New Jersey, to the termination thereof in this state, and along the front of the mountain lands extending along the west bank of the Hudson river from the northerly limit of the Palisades to the state reservation at Stony Point and in the mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties south of the city of Newburgh and in other lands to the west thereof and extending into the Ramapo mountains and in such other lands as may be acquired by the said board of commissioners except the land comprised in the said United States government reservation at West Point and the land comprised in the said state reservation at Stony Point and thereby preserving the scenic beauty of the Palisades and of said lands or securing the use thereof to the public for park purposes.

§6. *Map; appraisal of damages.* Before any proceeding shall be had or taken for acquiring the title by eminent domain to any of the land located as aforesaid, the said commissioners shall cause to be made, by such engineer and surveyor as they shall select, a map of the lands and rights in lands which they shall determine to take, showing the boundaries of the individual pieces of land embraced therein, and the names of the owners or reputed owners thereof, as nearly as the same can be ascertained, and shall at the same time proceed to investigate, ascertain and appraise as nearly as may be the full and fair value of the lands shown on the said map. A copy of which map certified by a majority of said commissioners, together with a report of their proceedings in the matter of said estimate and appraisal and the results thereof shall be filed in the office of the secretary of state and in the office of the clerk of the county in which the lands and rights in lands so to be taken and acquired are situated. The said commissioners shall also file in like manner any modifications or amendments which they may from time to time desire to make in said map, and the said map shall thereafter be deemed to be altered in accordance with such modifications and the same proceedings may be had thereafter as are herein provided for in relation to the lands shown on said map as originally filed.

§7. *Notice of intention to take.* After the filing of the said map as above required, the said commissioners shall from time to time and at such times as they may deem advisable, publish for four successive weeks in two newspapers printed and published in the county in which the lands and rights in lands so to be taken and acquired are situated, a notice declaring that the commissioners of the Palisades interstate park intend to take and appropriate such of the lands and rights in lands shown on the said map as are described in such notice, and acquire title

thereto and hold the same in trust for the people of the state of New York, and that the said commissioners intend to apply to the Supreme Court in the ninth judicial district, on a day specified for the appointment of three freeholders, residents of the state of New York, to act as commissioners of appraisement, to ascertain and report the just compensation to be paid to person or persons or corporation owning or having an interest in said property.

§8. Upon the day designated in the said notice or some other day to be named by the said court, the said court shall hear the application of the said commissioners, and shall appoint three disinterested persons, freeholders, and residents of the state of New York commissioners of appraisement for the purpose aforesaid. And in case any commissioner of appraisement shall decline to serve, the said court may on application of the said board of commissioners of the Palisades Interstate Park, upon notice of such vacancy and application to be published in a newspaper in the county in which the lands or rights in lands so to be taken and acquired are situated, for ten successive week days appoint another in his place.

§9. The commissioners of appraisement so appointed shall, before they enter upon their duties, take and subscribe an oath, or affirmation, to be administered by some person authorized to administer oaths, faithfully and impartially to execute their duties according to the best of their ability. They shall cause to be published for five successive week days, in a paper printed and published in the county in which the lands or rights in lands so to be taken and acquired are situated, a notice of their appointment, containing a brief statement of the purposes for which they have been appointed, and requiring all parties and persons interested in the lands and rights to be taken or acquired by said board of commissioners

of Palisades interstate park, pursuant to said application and the order of their appointment, and having any claim or demand on account thereof, to present the same to them duly verified, with such affidavit or other proof as the owner or claimants may desire, within thirty days after the date of the first publication of said notice and stating a time and place after the expiration of said thirty days when the said parties and persons shall be heard in relation thereto by said commissioners of appraisement. At the time and place fixed by said notice, or at any such further or other times and places as said commissioners may appoint, said commissioners shall hear such owners and examine the proof of such claimant or claimants, or such additional proof and allegations as may then be offered by such owners or on behalf of said board of commissioners of the Palisades interstate park. They shall give notice of the time and place of their meeting to view the said property, hereinafter provided for, by publishing the same in a newspaper printed and published in the county in which the lands or rights in lands so to be taken and acquired are situated, for twelve successive week days.

§10. *Duties of appraisers; report.* The commissioners of appraisement shall together view such property and shall receive any legal evidence as to the compensation that should be made therefor, and may adjourn from time to time. They shall ascertain and award to the respective owners of the property to be taken, and to all persons and corporations interested therein, such compensation therefor as in their opinion shall be just and proper and in fixing the amount of such compensation, said commissioners shall not make any allowance or deduction on account of any real or supposed benefit which the parties interested may derive from the said park or improvement for which said lands are to be taken. The report of the commissioners of appraisement, signed by a majority of

said commissioners, shall be filed in the office of the clerk of the county in which the lands or rights in lands so to be taken and acquired are situated, as soon as completed, and said report shall be made and filed within six months from the time of their appointment; provided, however, that the time for the filing of said report may at any time be extended by a special term of the supreme court sitting in the ninth judicial district upon application of any person interested. Their oaths of qualifications and their minutes of the testimony taken by them, if any, shall be attached to and filed with their said report and form a part thereof.

§11. *Notice of application to confirm report.* After the report of the said commissioners of appraisement shall be so filed, the board of commissioners of the Palisades interstate park shall give notice, by publishing the same in ten successive numbers of any newspapers printed and published in the county in which the lands or rights in lands so to be taken and acquired are situated, that they will on a day to be specified in said notice apply to the said supreme court, for an order confirming the report, and on the day so appointed, the said court, upon being furnished with proof of the due publication of said notice as above provided, shall confirm such report and make an order containing a recital of the substance of the proceedings in the matter of the appraisement and a description of the real estate appraised, for which compensation is to be made, and the amount of compensation to be made in each case, and shall also direct to whom the money is to be paid. The said court shall also tax and allow such costs, fees and expenses to the commissioners of appraisement and other persons performing any legal duty in the premises as it shall think equitable and right, which shall be paid by said board of commissioners. Provided, however, that the total fees to all attorneys for property owners in any one proceeding shall not ex-

ceed five per centum of the total of all of the awards and that no one property owner shall be allowed for attorney's fees more than the sum of one tnousand dollars. Provided, further, that no attorney shall be allowed attorney's fees unless the attorney claiming the same files an affidavit stating that he has received no compensation from the owner in such proceeding and the owner is under no contract to pay him any fee. Provided, further, that no one owner shall be allowed fees for witnesses as to value at a greater rate than seven dollars per day for three such witnesses. And provided further that the fees allowed the commissioners of appraisement shall not exceed forty dollars per day for each commissioner.

§12. A certified copy of the order so to be made as aforesaid shall be recorded at full length in the office of the clerk of the county in which the lands or rights in lands so to be taken and acquired are situated and also in the office of the secretary of state.

§13. *Appeal.* Within twenty days after the confirmation of the report of the commissioners of appraisement, as provided for in the eleventh section of this act, any party may appeal on giving notice as provided in the code of civil procedure to the appellate division of the supreme court in the second department, from the appraisal and report of the commissioners. Such appeal shall be heard by the said appellate division at the next thereafter ensuing term thereof, on due notice thereof being given according to the rules and practice of said court. On hearing of such appeal the court may direct a new appraisement before the same or new commissioners to be by it appointed, in its discretion. In case the court shall order a new appraisement the appraisers appointed to make the same shall qualify and proceed in all respects as provided in sections nine and ten hereof, and such second appraisement shall be final and conclusive upon both parties.

§14. In case there should be conflicting claimants for any of the money awarded to be paid for any of the said lands or rights in lands appraised as aforesaid, or in case the person entitled to receive any money awarded to be paid for any of the said lands or rights in lands so appraised cannot be ascertained, or is absent from the state or under any legal incapacity that disqualifies him or them from receiving legal payment of the money awarded, then it shall be the duty of said commissioners of the Palisades Interstate Park upon making payment for the lands taken and appraised as aforesaid, to pay the amounts awarded to said person or persons to the clerk of the county in which the lands or rights in lands so taken and acquired are situated who shall receive the same, and pay over the same as he may be ordered by the said supreme court, which upon application made thereto shall determine who is entitled to the same, and direct to whom the same shall be paid, and may in its discretion, order a reference to ascertain the facts upon which said determination and order are to be made. Any and all such payments to said clerk shall be equivalent to payment to the parties entitled thereto, and shall operate to transfer the title of the said lands or rights in lands to the said board of commissioners, as if payment had been made directly to the parties entitled thereof, and shall release the said board of commissioners from all claim therefor.

§15. If, at any time after an attempt to acquire title by compensation as aforesaid, it shall be found that the title attempted to be acquired is defective, the said commissioners of the Palisades Interstate Park shall proceed anew to acquire or perfect such title, in the manner hereinbefore set forth, and as if no appraisement had been made, and the said supreme court shall have power at any time to amend any defect or informality in any

of the proceedings to acquire title to the said lands, or rights in lands, or any of them, as may be necessary, and also to appoint other commissioners of appraisement in place of any who may die or refuse or neglect to serve or be incapable of serving, upon like notice, as required by section eight of this act.

§16. The said commissioners of the Palisades Interstate Park shall not acquire the title to or enter into possession of any of the said appraised premises until the amount awarded for the same shall have been paid to the owner or owners thereof or to the county clerk as aforesaid, but such payment shall operate to transfer the title to the said commissioners.

§17. *Report of commissioners; acquisition of lands to be made within eighteen months.* After the proceedings hereinbefore provided for, for the purpose of acquiring title by the said board of commissioners to the said lands or any of them shall have been concluded, the said board of commissioners of the Palisades interstate park, shall report such proceedings, and all other action by them taken, together with the amount awarded by the said commissioners of appraisement, to the legislature of this state. If said board of commissioners shall not complete the acquisition of any of said lands or rights described in any said notice, to be published as aforesaid, within eighteen months after the first publication by them of said notice of application provided for in section seven of this act, any person interested, upon at least eight days' notice in writing to said board of commissioners, may make application to said court for an order discontinuing all proceedings taken by said board of commissioners to acquire by eminent domain the said land or lands, right or rights in which he may be interested, and the court, in its discretion may grant or refuse such application and may, in the order made thereon,

award costs to either party. Provided, however, that such board of commissioners shall have the right at any stage of the proceeding to discontinue the proceeding by an order of the court fixing fees, costs and disbursements to be allowed to land owners as hereinbefore provided.

§18. The sum of ten thousand dollars or as much thereof as may be necessary, payable out of any moneys in the treasury not otherwise appropriated, is hereby appropriated to carry out the provisions of this act. The total amount of the expenditures by said commissioners shall not exceed such sum of ten thousand dollars. Payments from said appropriation shall only be made upon itemized accounts duly verified and in such sums as may be allowed by the comptroller after audit by him.

§19. This act shall take effect June first nineteen hundred.

1928 REVISION OF THE NEW YORK CONSERVATION LAW.

Chapter 242 of the Laws of 1928.

AN ACT to amend the conservation law, generally, and to conform the same to the state departments law, and repealing certain provisions of article eight of the state departments law, and certain other statutes.

Became a law March 5, 1928, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The schedule of articles of chapter six hundred and forty-seven of the laws of nineteen hundred and eleven, entitled "An act relating to conservation of land, forests, waters, parks, hydraulic power, fish and game, constituting chapter sixty-five of the consolidated laws," as amended, is hereby amended to read as follows:

Article I. Short title; definitions (§§1-2).
II. Department of conservation (§§3-10).
III. Division of lands and forests (§§50-65).
* * * * *
XVI. Division of parks (§§660-862).
* * * * *

§5. Article four of such chapter as added by chapter four hundred and fifty-one of the laws of nineteen hundred and sixteen, as amended, is hereby renumbered article three and is hereby amended to read as follows:

ARTICLE III.

Division of Lands and Forests.

* * * * *

§50. *Powers and duties of the department relative to lands and forests.* The conservation department shall, for the purpose of carrying out the provisions of this article, have the following powers, duties and authority to be exercised through or by the division of lands and forests:

1. Have the care, custody and control of the several preserves, parks and other state lands described in this article.

2. Have the power to establish, acquire, control and manage other state parks and parkways in the forest preserve counties, and in the counties of Albany, Jefferson, Montgomery, Schenectady and Schoharie, and to acquire lands for such purposes when moneys have been appropriated therefor.

* * * * *

30. Nothing in this chapter shall be construed as extending the jurisdiction of the division of lands and forests over the real or personal property now or hereafter under the control or in the custody of the commissioners of the Palisades interstate park, but said division, subject to the powers of the commissioner, is authorized to cooperate with said commissioners of the Palisades interstate park by the joint employment of wardens, foresters and keepers, for the mutual protection of the lands under their respective jurisdiction and other state commissions and the preservation of the forests thereon and of the fish and game therein.

* * * * *

§59. *Appropriation of real property.* The department shall, with the approval of the governor, have the power and authority to appropriate real property in the manner and under the conditions herein defined:

1. *Purposes:* (a) The department may enter upon and take possession of any lands or waters or both, or of any forests and rights in timber upon such lands, or upon any part, or portion thereof, within the Adirondack or Catskill parks or adjacent thereto, the appropriation of which, in the judgment of said department, shall be necessary for public park purposes, or for the protection and conservation of the lands, forests and waters within the state, and

(b) May enter upon and take possession of any lands or waters or both, within the state that may be necessary, in the judgment of said department, for the purpose of artificial propagation of food and game fish for restocking the public waters of the state.

2. *Description of land.* An accurate description of such property so entered upon and appropriated shall be made by the department, who shall certify under its seal that the description is correct, and shall endorse thereon a notice that the property described therein is appropriated by the people of the State of New York for the purpose described in this section. The original of such description and certificate shall be filed in the office of the secretary of state. The conservation department may make such additional copies of this certificate and description as may be necessary and certify the same.

3. *Service of notice.* The said department shall thereupon cause a duplicate of said description and certificate, with notice of the date of filing thereof in the office of said secretary of state, to be served on the owner or owners of the lands, forests, and rights in timber upon such lands and waters so appropriated; and from the time of such

service the entry upon and appropriation by the people of the state of the property described in such notice shall be deemed complete, and thereupon such property shall become, and be, the property of the people of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state; but the service of such notice shall raise no presumption that the lands, forests, and rights in timber upon such lands described therein are private property.

4. *Manner of service.* Service of the notice and papers provided for under subdivision three must be personal if the person to be served can be found within the state. If the said department shall not be able to serve said notice and papers or to cause the same to be served upon the owner or owners personally within the state, after making an effort so to do which said department shall deem to be reasonable and proper, service may be made by filing said notice and papers in the office of the county clerk of the county wherein the property so appropriated is situated and by causing such notice and papers to be recorded in the books used for recording deeds in the office of said clerk. On the filing of said notice and papers with said clerk, it shall be the duty of said clerk to record same in the books used for recording deeds in the office of said clerk and to index the name of the person or persons to whom said notice is directed as a grantor in an index book to be kept by said clerk.

In case such service is made by filing said notice and papers in the office of the county clerk, any person so served may at any time thereafter file a claim with the court of claims against the state, notwithstanding the two year limitation provided by this article or by the court of claims act, excepting that if the person so served shall be brought in and made a party to any claim or proceeding pending in the court of claims or before a referee having jurisdiction to hear, try or determine a

pending claim, such person so brought in and made a party shall not thereafter file a claim against the state on account of such appropriation, in addition to or in substitution for the claim to which he has been made a party, unless he shall file such additional or substituted claim within three months from the time he is so brought in and made a party.

5. *Description and certificates to be recorded.* If service be personal, the said department shall thereupon cause a copy of such notice and papers, together with an affidavit of due service thereof on such owner or owners, to be filed and recorded in the same manner as provided in subdivision four and it shall be the duty of said clerk to record and index same as provided in subdivision four in case service is other than personal; and the record of such notice, and of such proof of personal service, shall be presumptive evidence of due service thereof.

6. *Adjustment of claims by agreement.* Claims for the value of the property appropriated, and for legal damages caused by any such appropriation, may be adjusted by the department, even though a claim has been filed with the court of claims, if the amount thereof can be agreed upon with the owner or owners thereof. Upon making any such adjustment and agreement the department shall deliver to the comptroller a certificate stating the amount due to said owner on account of such appropriation of his land or other property, and the amount so fixed shall be paid out of the state treasury upon the audit and warrant of the comptroller. If the property was appropriated pursuant to the provisions of chapter five hundred and sixty nine of the laws of nineteen hundred and sixteen and acts supplemental thereto or amendatory thereof, such adjustment shall be subject to the approval of the commissioners of the land office.

7. *Court of claims, jurisdiction of.* Any owner may present to the court of claims a claim for the value of

such land and legal damages within two years after the service of such notice and papers upon him, unless sooner brought in and made a party by such court. If brought in and made a party by such court, he may file an independent claim in respect of such land within three months from the time he is so brought in but not thereafter. If any such claim is not adjusted by agreement, such court shall have jurisdiction to hear and determine such claim and render judgment thereon. Upon filing in the office of said department, and in the office of the comptroller, a certified copy of the judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been, or will be taken, by the state, or if an appeal has been taken, a certified copy of the final judgment of the appellate court affirming in whole or in part the judgment of the court of claims, the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid out of the state treasury.

8. *Court of claims to examine property.* The court of claims, if requested by the claimant or the attorney-general, shall examine the real property affected by the claim of damages for the appropriation thereof and take testimony in relation thereto in the county where such property or a part thereof is situated.

* * * * *

18. *Costs and Disbursements; when offer made.* If an offer is made by said department for the value of land appropriated, or for damages caused by such appropriation, and such offer is not accepted, and the recovery in the court of claims exceeds the offer, the claimant is entitled to costs and disbursements as in an action in the supreme court, which shall be allowed and taxed by the court of claims and included in its judgment. If in such a case the recovery in the court of claims does not exceed

the offer, costs and disbursements to be taxed shall be awarded in favor of the state against the claimant and deducted from the amount awarded to him; or if no amount is awarded, judgment shall be entered in favor of the state against the claimant for such costs and disbursements. If an offer is not accepted, it can not be given in evidence on the trial.

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§41. Such chapter is hereby amended by inserting therein a new article, to follow article fifteen, to be article sixteen, to read as follows:

ARTICLE XVI.

DIVISION OF PARKS.

Part 1. Organization of division of parks (§§660-662).

* * * * *

§662. Departmental visitation and control of state parks, parkways, reservations, places of historic or scientific interest and memorials. * * * Real property shall not hereafter be acquired with state moneys by any such commission, commissioners, society, board, trustees, corporation, association or authority by condemnation or appropriation, except with the approval of the conservation commissioner; but this provision shall not apply to such acquisitions made or to be made pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four, and such chapter shall not be affected or impaired by this article.

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PART 9.

Commissioners of the Palisades Interstate Park.

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§745. *Organization; terms of commissioners; vacancies.* There shall continue to be in the division of parks in the conservation department a board known as the commissioners of the Palisades interstate park to consist of ten commissioners to be appointed by the governor. At least five of such commissioners shall be citizens and residents of the state of New York and five of them may be residents of the state of New Jersey. The commissioners now in office shall continue in office until the expiration of their respective terms and until their successors shall be appointed and shall have qualified. The term of each commissioner shall be five years. Vacancies in the commission caused by death, resignation or refusal to act or removal from the state shall be filled by the governor by appointment for the unexpired term only. No member of said board shall receive any compensation for his services as commissioner, but each commissioner shall be entitled to receive his actual disbursements for his expenses in performing the duties of his office.

§746. *Powers; officers and employees; facilities; office.* Such board of commissioners, and their successors, shall be continued as a body politic with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings. Such board shall annually choose from among its members a president, a vice-president, treasurer and secretary and appoint such other officers and employees, including patrolmen, as it may deem necessary to carry out the provisions of this part of this article, and may employ counsel. The patrolmen so appointed shall be provided with uniforms by the board

of commissioners and shall have, within the limits of the property of the Palisades interstate park and all the lands, parks and parkways under the jurisdiction of such commissioners, all of the powers, duties and liabilities of constables of towns in the execution of criminal process; and criminal process issued by a police justice or magistrate of a village comprising or containing territory included in such park may be directed to and executed by any such patrolman, notwithstanding the provisions of any local or special act relating to any such village. The board of commissioners may also determine the duties and compensation of such appointees and remove them at pleasure, and make all reasonable rules and regulations respecting the same. The board of commissioners may also erect and operate elevators and escalators at such places in the park as the board may deem necessary or expedient and may provide and operate such other facilities, including any and all means of transportation to, from or in said park, for the use and enjoyment of such park by the public and for increasing the accessibility to the park of such public as the board may deem to be necessary or expedient, and the said board may also provide, at its discretion, by a proper rule or regulation, for the terms upon which, and the manner in which all such facilities may be used. Such board shall have and maintain a suitable office, where its maps, plans, documents, records and accounts shall be kept, subject to public inspection, at such times and under such reasonable regulations as the board shall determine.

§747. *Power to acquire land for parks.* The board of commissioners shall continue to have power to and shall from time to time proceed to select and locate such lands from the New Jersey state line on the south to Piermont creek, near Piermont in Rockland county, on the north lying between the high-water line of said river and the top of the steep edge of the palisades, or the

crest of the easterly slope of the uplands overlooking said river where the steep palisade rocks are absent or lying on the front of said palisades or uplands, as may in their opinion be proper and necessary to be reserved for the purpose of establishing or extending a state park and thereby preserving the scenic beauty of the palisades and uplands or securing the same to the use of the public for park purposes; and said board of commissioners shall have the further power to, and shall, as soon as said board shall deem it feasible and advisable, proceed to select and locate such mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties, north of Piermont creek and south of the city of Newburgh, and other lands to the west thereof and extending into the Ramapo mountains, except the land comprised in the United States government reservation at West Point and the land comprised in the state reservation at Stony Point, and other lands now owned by the state of New York, as may in the opinion of said board of commissioners, be proper and necessary for the purpose of extending the limits of said state park and thereby preserving the scenic beauty of or securing to the use of the public for park purposes the mountainous lands along and adjacent to the west bank of the Hudson river in Rockland and Orange counties and other lands to the west thereof and extending into the Ramapo mountains north of the palisades.

§748. *Acquisition of lands; maintenance of park.* The said board of commissioners shall continue to have the immediate custody, jurisdiction, management and control of all lands, parks or parkways which it now has under its jurisdiction and control or which has been heretofore acquired by it pursuant to law and shall have the power to acquire, maintain and make available for use as a public park, other lands located as aforesaid, and for this purpose shall have power to take in fee or other-

wise, by purchase, gift, devise or eminent domain, the said lands, or any of them and any rights, interests and easements therein, and to receive by gift, contribution or bequest moneys to be used in acquiring or improving the said lands or any of them; said board shall also have power to acquire for park purposes by gift or devise, and also by purchase when funds are hereafter made available therefor by the legislature, but not by eminent domain, any lands or rights in lands outside of the areas defined in section seven hundred and forty-seven hereof; deeds of conveyance for such lands shall be made to said board of commissioners by its corporate name, and it shall be the duty of said board to preserve, care for, lay out and improve the said park and to make rules for the use and government of the same, and of such parts of state, county and other public highways as lie along or within the boundaries of such park; a violation of any of such rules shall constitute a misdemeanor and shall be punishable by a fine of not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment, provided, however, that any rules which may apply to any part of any state or county highway, shall be subject to the approval of the superintendent of public works; said board shall have power also to lay out, construct and maintain roads, pathways and boulevards upon, across and over the said park, to lay out, construct and maintain roads between and connecting any separate portions of said park, and for this purpose to acquire rights of way upon and across any intervening lands, and to lay out, construct and maintain roads and ways connecting the roads and ways within said park with other public roads outside of and adjacent thereto. The said commissioners shall have the power, by proper deed executed in their corporate name, to sell and convey the right, title and interest of the said commissioners and of the people of the state of New York in and to any or all lands in the town

of Clarkstown, county of Rockland, previously acquired by them, which lie west of the crest of the mountainous lands bordering on the Hudson river in said county and which the said commissioners decide are not necessary or desirable for park purposes. All moneys received from the sale of such lands shall be deposited in the state treasury and, upon appropriation by the legislature, shall be devoted to the acquisition of other lands for the purposes of said park. The said commissioners may also sell all personal property, supplies, chattels, material and profits a prendre which they decide to be not necessary or desirable for the uses and purposes of the park. All moneys received from the sale of such personal property, supplies, chattels, material and profits a prendre and from the operation of the park shall, notwithstanding the provisions of section thirty-seven of the state finance law, be expended by said commissioners for the extension, development, operation and maintenance of such park in such manner as the commissioners may determine. The amounts received or expended under this section, as amended, shall be reported annually to the state comptroller. The said board of commissioners shall in laying out and maintaining such park have regard to the laying out and maintenance of such park as may be established by the state of New Jersey along the Palisades and the Hudson river, and shall so far as may be, lay out and maintain said park in such manner that it, together with such park as may be established by the state of New Jersey, shall form a continuous park, the intention of this part of this article being to provide, in conjunction with the state of New Jersey, for the establishing of a park along the entire front of the Palisades from Fort Lee, in Jersey, to the termination thereof in this state, and along the front of the mountain lands or other uplands extending along the west bank of the Hudson river from the northerly limit of the Palisades to the state reservation at Stony point and in the mountainous lands along and adjacent to the west bank

of the Hudson river in Rockland and Orange counties south of the city of Newburgh and in other lands to the west thereof and extending into the Ramapo mountains and in such other lands as may be acquired by the said board of commissioners, except the land comprised in the said United States government reservation at West Point and the land comprised in the said state reservation at Stony Point and thereby preserving the scenic beauty of the Palisades and of said lands or securing the use thereof to the public for park purposes.

§749. Section 6 of Chapter 170 of the Laws of 1900*, see p. 13, supra.

§750. Section 7 of Chapter 170 of the Laws of 1900*, see pp. 13-4, supra.

§751. Section 8 of Chapter 170 of the Laws of 1900*, see p. 14, supra.

§752. Section 9 of Chapter 170 of the Laws of 1900*, see pp. 14-15, supra.

§753. Section 10 of Chapter 170 of the Laws of 1900*, see pp. 15-16, supra.

§754. Section 11 of Chapter 170 of the Laws of 1900*, see pp. 16-17, supra.

§755. Section 12 of Chapter 170 of the Laws of 1900*, see p. 17, supra.

§756. Section 13 of Chapter 170 of the Laws of 1900*, see p. 17, supra.

§757. Section 14 of Chapter 170 of the Laws of 1900*, see p. 18, supra.

§758. Section 15 of Chapter 170 of the Laws of 1900*, see pp. 18-19, supra.

§759. Section 16 of Chapter 170 of the Laws of 1900*, see p. 19, supra.

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*Re-enacted without change.

§760. Report of commissioners, acquisition of lands to be made within eighteen months. After the proceedings hereinbefore provided for, for the purpose of acquiring title by the said board of commissioners to the said lands or any of them shall have been concluded, the said board of commissioners of the Palisades interstate park, shall report such proceedings, and all other action by them taken, together with the amount awarded by the said commissioners of appraisement, to the conservation department. If said board of commissioners shall not complete the acquisition of any of said lands or rights described in any said notice, to be published as aforesaid, within eighteen months after the first publication by them of said notice of application provided for in section seven hundred and fifty of this part of this article, any person interested, upon at least eight days' notice in writing to said board of commissioners, may make application to said court for an order discontinuing all proceedings taken by said board of commissioners to acquire by eminent domain the said land or lands, right or rights in which he may be interested, and the court, in its discretion, may grant or refuse such application and may, in the order made thereon, award costs to either party. Provided, however, that such board of commissioners shall have the right at any stage of the proceedings to discontinue the proceeding by an order of the court fixing fees, costs and disbursements to be allowed to landowners as hereinbefore provided.

§761. Acquisition of lands by entry and appropriation. In addition to the various methods of acquiring lands provided for in this part of this article, the commissioners of the Palisades interstate park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law.

* * * * *

§50. The following laws are hereby repealed together with any laws amendatory thereof or supplemental thereto:

Article four-a of the conservation law, as added by chapter one hundred and eighty-nine of the laws of nineteen hundred and twenty-four; article nine of the public lands law; chapter four hundred and sixty-eight of the laws of nineteen hundred and twenty-one; chapter three hundred and twenty-five of the laws of nineteen hundred and twenty-six; article ten of the public lands law, as added by chapter eighty-eight of the laws of nineteen hundred and twenty-four; article fifteen of the public lands law, as added by chapter one hundred and ninety-eight of the laws of nineteen hundred and twenty-five; article sixteen of the public lands law, as added by chapter one hundred and ninety-eight of the laws of nineteen hundred and twenty-five; chapter one hundred and seventy of the laws of nineteen hundred; chapter five hundred and four of the laws of nineteen hundred and one; chapter one hundred and twelve of the laws of nineteen hundred and twenty-four; chapter three hundred and eight of the laws of nineteen hundred and sixteen; chapter seven hundred and sixteen of the laws of nineteen hundred and thirteen; chapter four hundred and nineteen of the laws of nineteen hundred; chapter one hundred and fifty-one of the laws of nineteen hundred and ten; chapter six hundred and fifty-three of the laws of nineteen hundred and four; chapter two hundred and twenty-two of the laws of nineteen hundred and twenty-four; chapter five of the laws of eighteen hundred and eighty-nine; article eight of the public buildings law as added by chapter six hundred and sixty-two of the laws of nineteen hundred and twenty-one; article seven of the public buildings law, as added by chapter one hundred and ninety-eight of the laws of nineteen hundred and eighteen * * *

§51. This act shall take effect immediately.

BOND REFERENDUM ACT.

Laws of 1924, Chapter 602.

AN ACT making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified state park system for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four.

Became a law May 2, 1924, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. There shall be issued, in the manner and at the times hereinafter recited, bonds of the state in an amount not to exceed fifteen million dollars, which bonds shall be sold by the state and the proceeds thereof paid into the state treasury, and so much thereof as may be necessarily expended for the development, improvement and extension of state parks within the state of New York, including the acquisition of lands, and for the establishment of a unified state park system as hereinafter provided. Such bonds when issued shall be exempt from taxation.

§2. The comptroller is hereby directed to cause to be prepared the bonds of the state to an amount not to exceed fifteen million dollars ($15,000,000), such bonds to bear interest at the rate of not in excess of five per centum per annum, which interest shall be payable semi-annually in the city of New York. Such bonds, or such

portion thereof as may be issued, shall be serial bonds payable in equal annual instalments, the first of which shall be payable one year after the date of issue and the last of which shall be payable at such time as may be hereafter prescribed by law, but not more than fifty years after the debt or fraction thereof shall have been contracted. Such bonds shall be sold for not less than par. The comptroller is hereby charged with the duty of selling such bonds to the highest bidder after advertising for a period of twenty consecutive days, Sundays excepted, in at least two daily newspapers printed in the city of New York and one in the city of Albany. Advertisements shall contain a provision to the effect that the comptroller, in his discretion, may reject any or all bids made in pursuance of such advertisements, and, in the event of such rejection, the comptroller is authorized to readvertise for bids in the form and manner above described as many times as in his judgment may be necessary to effect a satisfactory sale. Said bonds shall be sold in such lots and at such times as may be required for the purpose of making partial or final payments in accordance with the provisions of this act. The principal and interest on such bonds as the same accrue shall be paid out of appropriations made therefor pursuant to law.

§3. The proceeds of such bonds, after appropriation or appropriations therefrom by the legislature, shall be applicable to the development, improvement and extension of state parks within the state of New York, including the acquisition of lands or waters or both for the extension or establishment thereof, and for surveys, examination of titles and other necessary expenses incidental to the acquisition of such lands, as follows, provided that no part of the sum set aside for the state forest preserve shall be used for any other purpose than

for the acquisition of lands within the forest preserve counties, which lands if now owned by the state under existing law, would be part of the forest preserve.

For the state forest preserve	$5,000,000
For the Palisades Interstate park	3,500,000
For the Allegany state park	2,000,000
For the New York state reservation at Niagara	1,000,000
For the Letchworth park	500,000
For the parks and parkways in the Finger lake region	500,000
For parkway connections between the Bronx river parkway and the bridge from Peekskill to Bear Mountain, in Westchester county	1,000,000
For the development of a state park system on Long Island	1,000,000
For the development and extension of other state parks and the acquisition and development of additional parks, including the further development of the state reservation at Saratoga Springs, the Taconic Park and the park on the Tongue mountain peninsula at Lake George	500,000

§4. The moneys for the state forest preserve shall be expended and lands acquired under the direction of the conservation commissioner by and with the advice and consent of the commissioners of the land office. The moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended. The moneys for the extension and im-

provement of the Allegany state park shall be expended by the commissioners of the Allegany state park. The moneys for the extension and improvement of the New York state reservation at Niagara shall be expended by the commissioners of that reservation. The moneys for the Bronx parkway extensions and connections shall be expended by the Westchester county park commission as the agent of the state, or otherwise as the legislature may determine. The moneys for the Long Island park system shall be expended by a commission constituted by the legislature, to be known as the Long Island state park commission. The moneys for the extension and improvement of the Letchworth park shall be expended by the American Scenic and Historic Preservation Society. The moneys for the extension and improvement of state parks in the Finger lake region shall be expended by a commission to be constituted as the legislature may determine. The remaining moneys for other park extensions and for new parks, including the further development of the state reservation at Saratoga Springs and Lake George park, shall be expended under the direction of the conservation commission, or otherwise as the legislature may determine. The legislature may at any time hereafter provide that the moneys as to which it is hereinbefore provided that the expenditure shall be made under the direction of the respective commissioners, commissions or societies in this section specified, may be expended by any other state department, board, commissioners, commission or officer that it may designate. Except as in this section otherwise provided such lands may be acquired in such manner as the legislature may provide, which may be either by purchase, by condemnation or by entry and appropriation with submission to the court of claims or supreme court for the determination and award of damages for such entry and appropriation, or by one or more of such methods as the legislature may provide.

§5. The moneys appropriated for the acquisition of lands under this act shall be available for the payment of the purchase price where lands are acquired by contract or for payments of judgments and awards in case of purchase by condemnation. Moneys appropriated for the acquisition of forest preserve lands, and of lands in the Allegany state park shall also be available for the payment of judgments and awards in case of proceedings by entry and appropriation.

§6. The term "lands" as used in this act includes the improvements thereon. All lands acquired under the state park system contemplated by this act shall be for the use of all the people.

§7. This law shall not take effect until it shall at a general election have been submitted to the people and have received a majority of all the votes cast for and against it at such election; and the same shall be submitted to the people of this state at the general election to be held in November, nineteen hundred and twenty-four. The ballots to be furnished for the use of the voters upon the submission of this law shall be in the form prescribed by the election law and the proposition or question to be submitted shall be printed thereon in substantially the following form, namely: "Shall chapter (here insert the number of the chapter) of the laws of nineteen hundred and twenty-four, entitled 'An act making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified state park system for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four,' be approved?"

APPROPRIATION ACT OF 1926.

Laws of 1926, Chapter 16.

AN ACT making appropriation for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified state park system for the promotion of the recreation, instruction and health of the people, to carry out the provisions of chapter six hundred and two of the laws of nineteen hundred and twenty-four.

Became a law February 24, 1926, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. There is hereby appropriated out of moneys realized from the sale of bonds issued in pursuance of the provisions of chapter six hundred and two of the laws of nineteen hundred and twenty-four, the following sums for the following parks, parkways and parkway connections:

(1) For the acquisition of lands for state park purposes within the forest preserve counties, within or without the limits of the Adirondack and Catskill parks, which lands if owned by the state on the fourth day of November nineteen hundred and twenty-four, under the existing law would be part of the forest preserve, the sum of five million dollars ($5,000,000).

(2) For the Palisades Interstate park, the sum of three million five hundred thousand dollars ($3,500,000), which sum shall be available for the acquisition of lands for the extension of such park, and for the development

and improvement of such park as now existing or as so extended, or for both.

(3) For the Allegany state park, the sum of two million dollars ($2,000,000), which sum shall be available for the acquisition of lands for the extension of such park and for the development and improvement of such park as now existing or as so extended, or for both.

(4) For the New York state reservation at Niagara, the sum of one million dollars ($1,000,000), which sum shall be available for the acquisition of lands for the extension of such reservation, and for the development and improvement of such reservation as now existing or as so extended, or for both.

(5) For the Letchworth park the sum of five hundred thousand dollars ($500,000), which sum shall be available for the acquisition of lands for the extension of such park, and for the development and improvement of such park as now existing or as so extended, or for both.

(6) For parks and parkways in the Finger Lakes region the sum of five hundred thousand dollars ($500,000), which sum shall be available for the acquisition of lands for the extension and establishment of such parks and parkways, and for the development and improvement of such parks and parkways as now existing or as so extended or established, or for both.

(7) For parkway connections between the Bronx river parkway and the bridge from Peekskill to Bear mountain in Westchester county the sum of one million dollars ($1,000,000), which sum shall be available for the acquisition of lands for such parkway connections, and for the development and improvement of such parkway

connections as now existing or as so extended, or for both.

(8) For the development of a state park and parkway system on Long Island, the sum of one million dollars ($1,000,000), which sum shall be available for the acquisition of lands for the extension and establishment of such parks and parkways, and for the development and improvement of such parks and parkways, as now existing or as so extended or established, or for both.

(9) For the state reservation at Saratoga Springs the sum of one hundred thousand dollars ($100,000), which sum shall be available for the acquisition of lands for the extension of such reservation.

(10) For parks and parkways in the Taconic region, being the territory embracing the counties specified in subdivision one, section one hundred and fifty-two of the public lands law, the sum of one hundred twenty-five thousand dollars ($125,000), which sum shall be available for the acquisition of lands for the extension and establishment of such parks and parkways, and for the development and improvement of such parks and parkways as now existing or as so extended or established, or for both.

(11) For the John Boyd Thacher park the sum of thirty thousand dollars ($30,000), which sum shall be available for the acquisition of lands for the extension of such park, and for the development and improvement of such park as now existing or as so extended, or for both.

(12) For the Saint Lawrence reservation the sum of fifteen thousand dollars ($15,000), which sum shall be available for the acquisition of lands for the extension

of such reservation, and for the development and improvement of such reservation as now existing or as so extended, or for both.

(13) For parks and parkways in the central New York region, being the territory embracing the counties specified in subdivision one, section one hundred and forty-two of the public lands law, the sum of one hundred twenty-five thousand dollars ($125,000), which sum shall be available for the acquisition of lands for the extension and establishment of such parks and parkways and for the development and improvement of such parks and parkways as now existing or as so extended or established, or for both.

(14) For a state park at Fairhaven, on Lake Ontario, the sum of fifty thousand dollars ($50,000), which sum shall be available for the acquisition of lands for the establishment of such park.

(15) For other state parks and parkways, including Lake George battlefield and a park on the Tongue mountain peninsula at Lake George, the sum of fifty-five thousand dollars ($55,000), which sum shall be available for the acquisition of lands for the extension and establishment of such parks and parkways, and for the development and improvement of such parks or parkways as now existing or as so established and extended, or for both, which sum shall be allocated by the state council of parks.

§2. (1) The moneys for the state forest preserve shall be expended and lands acquired under the direction of the conservation commissioner.

(2) The moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commis-

sioners of the Palisades Interstate park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended.

(3) The moneys for the development, improvement and extension of the Allegany state park shall be expended and the lands shall be acquired by the commissioners of the Allegany state park.

(4) The moneys for the development, improvement and extension of the New York state reservation at Niagara shall be expended and the lands shall be acquired by the commissioners of that reservation. Of such moneys there may be available for the acquisition of land to extend the reservation south along the Niagara frontier in Erie county such sum as the commissioners of the New York state reservation at Niagara in their discretion may allot. Such acquisition may be by the Erie county park commission as the agent of the state, subject to the approval of the commissioners of the New York state reservation at Niagara. Lands to extend the reservation in Erie county shall be acquired in the manner provided by statute for the acquisition of lands by the Erie county park commission, but such lands, when acquired, shall be the property of the state.

(5) The moneys for the development, improvement and extension of and acquisition of lands for the Letchworth park shall be expended by the American Scenic and Historic Preservation Society.

(6) The moneys for the development, improvement, extension and establishment of state parks and parkways in the Finger lakes region and for a state park at Fairhaven, on Lake Ontario, shall be expended and the lands shall be acquired by the Finger lakes state parks commission.

(7) The moneys for the Bronx parkway extension and connections shall be expended and the lands shall be acquired by the Westchester county park commission as the agent for the state. Lands for such parkway extensions and connections shall be acquired in the manner provided by statute for the acquisition of lands by the Westchester county park commission, but such lands, when acquired, and such improvements shall be the property of the state.

(8) The moneys for the establishment, extension, development and improvement of a state park and parkway system on Long Island shall be expended and the lands shall be acquired by the Long Island state park commission.

(9) Moneys for the extension of the state reservation at Saratoga Springs shall be expended and the lands shall be acquired by the conservation commission in the manner provided in this act, notwithstanding any other statute.

(10) Moneys for the development, improvement, extension and establishment of state parks and parkways in the Taconic region shall be expended and the lands shall be acquired by the Taconic state park commission.

(11) Moneys for development, improvement and extension of and for the acquisition of lands for the John Boyd Thacher park shall be expended by the American Scenic and Historic Preservation Society.

(12) Moneys for the extension, development and improvement of the Saint Lawrence reservation shall be expended and the lands acquired by the conservation commission.

(13) Moneys for the development, improvement, extension and establishment of parks and parkways in the

central New York region shall be expended and the lands shall be acquired by the central New York state parks commission.

(14) Moneys for the development, improvement, extension and establishment of other state parks and parkways shall be expended and the lands acquired by the commission or other body or officer having jurisdiction over the county in which such lands are located as prescribed by chapter one hundred ninety-eight of the laws of nineteen hundred and twenty-five.

§3. Lands for the Allegany state park; for the New York state reservation at Niagara; for the Letchworth park; for the state parks and parkways in the Finger Lakes region; for the state parks and parkways on Long Island; for the state reservation at Saratoga Springs; for the Taconic state park; for the John Boyd Thacher park; for the Saint Lawrence reservation; for the state parks and parkways in the central New York region; for a state park at Fairhaven on Lake Ontario; and for other state parks for the acquisition of which special provision is not hereinbefore made, shall be acquired by the commission or other body authorized to acquire the same, except any park as to which a county park commission acts as agent of the state, by purchase, or by condemnation in the manner provided by chapter nine hundred and twenty-three of the laws of nineteen hundred and twenty, known as the condemnation law, and amendments thereto, or by the appropriation of such lands in the manner provided by section fifty-nine of the conservation law for the appropriation of certain park lands. In all cases of entry and appropriation, the governor, before giving his approval, shall satisfy himself that there is available a sum representing fair compensation for the land to be entered and appropriated, and such sum shall be set aside to meet the judgment of the

(7) The moneys for the Bronx parkway extension and connections shall be expended and the lands shall be acquired by the Westchester county park commission as the agent for the state. Lands for such parkway extensions and connections shall be acquired in the manner provided by statute for the acquisition of lands by the Westchester county park commission, but such lands, when acquired, and such improvements shall be the property of the state.

(8) The moneys for the establishment, extension, development and improvement of a state park and parkway system on Long Island shall be expended and the lands shall be acquired by the Long Island state park commission.

(9) Moneys for the extension of the state reservation at Saratoga Springs shall be expended and the lands shall be acquired by the conservation commission in the manner provided in this act, notwithstanding any other statute.

(10) Moneys for the development, improvement, extension and establishment of state parks and parkways in the Taconic region shall be expended and the lands shall be acquired by the Taconic state park commission.

(11) Moneys for development, improvement and extension of and for the acquisition of lands for the John Boyd Thacher park shall be expended by the American Scenic and Historic Preservation Society.

(12) Moneys for the extension, development and improvement of the Saint Lawrence reservation shall be expended and the lands acquired by the conservation commission.

(13) Moneys for the development, improvement, extension and establishment of parks and parkways in the

central New York region shall be expended and the lands shall be acquired by the central New York state parks commission.

(14) Moneys for the development, improvement, extension and establishment of other state parks and parkways shall be expended and the lands acquired by the commission or other body or officer having jurisdiction over the county in which such lands are located as prescribed by chapter one hundred ninety-eight of the laws of nineteen hundred and twenty-five.

§3. Lands for the Allegany state park; for the New York state reservation at Niagara; for the Letchworth park; for the state parks and parkways in the Finger Lakes region; for the state parks and parkways on Long Island; for the state reservation at Saratoga Springs; for the Taconic state park; for the John Boyd Thacher park; for the Saint Lawrence reservation; for the state parks and parkways in the central New York region; for a state park at Fairhaven on Lake Ontario; and for other state parks for the acquisition of which special provision is not hereinbefore made, shall be acquired by the commission or other body authorized to acquire the same, except any park as to which a county park commission acts as agent of the state, by purchase, or by condemnation in the manner provided by chapter nine hundred and twenty-three of the laws of nineteen hundred and twenty, known as the condemnation law, and amendments thereto, or by the appropriation of such lands in the manner provided by section fifty-nine of the conservation law for the appropriation of certain park lands. In all cases of entry and appropriation, the governor, before giving his approval, shall satisfy himself that there is available a sum representing fair compensation for the land to be entered and appropriated, and such sum shall be set aside to meet the judgment of the

court of claims or other court on appeal, if any, or to meet any intermediate agreement as to compensation.

Lands for the state forest preserve shall be acquired in the manner or method herein provided, by and with the advice and consent of the commissioners of the land office, if any, without other approval. Any such consent shall be by resolution and a certified copy thereof shall be filed in the office of the secretary of state.

§4. The commission or other body or officer which directs the expenditure of moneys for the acquisition of lands and for developments and improvements under its jurisdiction, excepting, however, the conservation commissioner in the acquisition of lands for state park purposes within the forest preserve counties, and the conservation commission in the acquisition of lands for the state reservation at Saratoga Springs or the acquisition of lands for the Saint Lawrence reservation and the development of such reservation, shall present to the state council of parks a map or maps for land acquisition showing the location and extent of each park or parkway proposed to be acquired, together with estimates of the cost of such acquisition, development or improvement, and shall also report, from time to time, any proposed modifications of such maps and estimates. It shall be the duty of the council to pass upon such maps, estimates and modifications and to submit them for approval to the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. No commission or other body or officer authorized to direct the expenditure of moneys for the acquisition of lands or for developments or improvements, excepting the conservation commissioner in the acquisition of lands for state park purposes within the forest preserve counties, and the conservation commission in the acquisition of lands for the state reservation at Saratoga

Springs or the acquisition of lands for the Saint Lawrence reservation and the development of such reservation, shall obligate itself for the expenditure of or expend moneys hereby appropriated for land acquisition, developments or improvements until its maps and estimates therefor shall have been passed upon by the state council of parks and until such maps and estimates shall have been submitted to the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee in such detail as they shall require and shall have been approved by them. The conservation commission shall not obligate itself for the expenditure of or expend moneys hereby appropriated for lands for the state reservation at Saratoga Springs or for the Saint Lawrence reservation and the development of such reservation until its maps and estimates therefor shall have been approved by the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee as aforesaid.

§5. The moneys appropriated for the acquisition of lands under this act shall be available for the payment of the purchase price where lands are acquired by purchase or for payments of judgments and awards in case of acquisition by condemnation or by entry and appropriation. Where money is appropriated by this act for the acquisition of lands, so much as may be necessary may be used for the purpose of making surveys, examinations of title and other necessary expenses incidental to the acquisition of such lands. All examinations of title under this act shall be made under the supervision and subject to the approval of the attorney-general. The attorney-general shall conduct, in the name of the people of the state of New York, all proceedings authorized by this act to be taken for the condemnation or appropriation of lands, except proceedings to acquire lands for the

Palisades Interstate park, subject, however, to the power of the commission or other body authorized to make such appropriation of lands, to make, file and serve descriptions, certificates and notices as provided by section fifty-nine of the conservation law.

Any lands to be acquired as herein provided may be so acquired subject to such rights and easements as such commission or other body may determine.

§6. The term "lands" as used in this act includes the improvements thereon. All lands acquired under the state park system contemplated by this act shall be for the use of all the people and title thereto shall be taken in the name of the people of the state of New York, except that title to lands acquired for the Palisades Interstate park may be taken as provided by chapter one hundred and seventy of the laws of nineteen hundred, as amended.

§7. The moneys hereby appropriated shall be paid out by the treasurer on the warrant of the comptroller after submission to him of vouchers therefor approved by the officer or the head or an authorized member of the commission or society authorized by this act to make such expenditures; except that moneys expended for the examination and approval of land titles, searches and the conduct of proceedings for the acquisition of property, shall be paid out on vouchers approved by the attorney-general. The comptroller is hereby authorized to charge respectively against the various funds appropriated herein for the several parks, parkways and reservations, and to reserve therefrom sums for the necessary expenses to be incurred by the attorney-general for searches, examination and approval of titles and the conduct of proceedings for the acquisition of property for each such park, upon the filing of a certificate or

certificates of the attorney-general from time to time setting forth such estimated expenses relative to each park approved by the officer, head or authorized member of the commission or society authorized by this act to make expenditures. The expenses of the attorney-general shall be paid from such reserved funds.

§8. The state council of parks with the approval of the governor, the chairman of the senate finance committee, and the chairman of the assembly ways and means committee, shall, from time to time, certify to the comptroller the amounts required by the several commissions and other bodies or officers authorized to expend moneys hereby appropriated, specifying in such certificates the probable life of the work or object for which the bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four are to be issued, as such probable life is determined by section fifty-one of the state finance law as added by chapter twenty-three of the laws of nineteen hundred and twenty-four, and amendments thereto. Provided, however, that as to amounts required by the conservation commissioner in the acquisition of lands for state park purposes within the forest preserve counties, such certification shall be made by the conservation commissioner and as to amounts required by the conservation commission in the acquisition of lands for the state reservation at Saratoga Springs or the acquisition of lands for the Saint Lawrence reservation and the development of such reservation, such certification shall be made by the conservation commissioner with the approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. The moneys hereby appropriated shall not be available until such certifications shall have been made and such moneys shall not be available in excess of the amounts so certified.

The comptroller is also hereby authorized to apportion the expense of preparing and selling such bonds against the various appropriations and to use such apportioned fund in paying such expense.

§9. This act shall take effect immediately.

APPROPRIATION ACT OF 1928.

Laws of 1928, Chapter 75.

AN ACT making appropriations for the support of government. Became a law February 17, 1928, with the approval of the Governor. Passed, by a two-thirds vote.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

* * * * *

PART V.[1]

SECTION 5. The following sums, or so much thereof as may be necessary, being the unexpended balances of former appropriations, are hereby reappropriated and made immediately available for the same purposes as the former appropriations.

* * * * *

* * * * *

PALISADES INTERSTATE PARK FUND.[2]

By chapter 199 of the laws of 1926 (re. $3,899.28).

STATE INSTITUTIONS BUILDING FUND.

By chapter 199 of the laws of 1926 (re. $443,781.73).

By chapter 769 of the laws of 1926; provided, however, that the amount of the item of $90,000 for Rochester State Hospital, Lakeside dormitory, contained in such chapter shall be available instead for Rochester state hospital, additional accommodations for patients (re. $11,956,420.08).

STATE PARK SYSTEM FUND.

By chapter 16 of the laws of 1926 (re. $11,912,850.58).

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[1] N. Y. Laws, 1928, p. 214.

[2] N. Y. Laws, 1928, p. 224.

GENERAL CONSTRUCTION LAW.

Chapter 27, Laws of 1909.

§80. *References to repealed provisions.* If any provision of a law be repealed and, in substance, reenacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision.

§95. *Effect of the Repeal of a Statute by Another Statute Substantially Re-enacting the Former.* The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, and not as new enactments.

COURT OF CLAIMS ACT.

Laws of 1920, Chapter 922.

AN ACT in relation to the court of claims and the jurisdiction, practice and procedure therein.

Became a law May 21, 1920, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Short title. This act shall be known as the "Court of Claims Act."

§2. Organization of court of claims. The court of claims is hereby continued. Such court shall consist of three judges, to be known as judges of the court of claims, who shall be appointed by the governor, by and with the advice and consent of the senate. The term of office of each judge shall be nine years. Whenever the term of office of a judge shall expire, or his office become vacant from any cause, his successor shall be appointed for the unexpired term. Notwithstanding the provisions of section five of the public officers law, a judge of the court of claims shall hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified, but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. By an order to be filed in the office of the secretary of state, the governor shall designate one of the judges as presiding judge, who shall act as such during his term, and thereafter upon the appointment of his successor, the governor shall designate such successor or any other judge of the court as presiding judge, who shall act as such during his term. A

judge of the court of claims, must be an attorney and counselor-at-law admitted to practice in the courts of this state, of at least ten years' experience in practice. The judges of the court of claims shall have jurisdiction to hear and determine all matters now pending in the court of claims. Whenever in this act or in any other statute reference is made to the board of claims or any officer thereof, the same shall be deemed to refer to and mean the court of claims or an officer thereof. A determination of the board of claims, heretofore rendered shall have the same force and effect and be subjected to the same procedure as provided in article two for a judgment (Amended by L., 1924, ch. 121, in effect April 12, 1924.)

* * * * *

§10. Record of proceedings and report to legislature. The court shall keep a record of its proceedings, and, at the commencement of each session of the legislature, and at such other times during the session as it may deem proper, or as the senate or assembly may request, report to the legislature the claims upon which it has finally acted, with a statement of the judgment rendered in each case.

§11. Annual report to comptroller. On the first day of January in each year, the clerk shall report, to the comptroller, under oath, a detailed statement of his disbursements made under the direction of the court from its contingent fund during the preceding year.

§12. Jurisdiction of court. The court of claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state, including a claim of an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the

part of the state by which the decedent's death was caused, which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. It may also hear and determine any claim on the part of the state against the claimant, or against his assignor at the time of the assignment, and must render judgment for such sum as should be paid by or to the state. But the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer. Nothing in this act contained shall be construed to allow the court to hear any claim which as between citizens of the state would be barred by lapse of time or of any claim heretofore accrued and of which the said court or board has had jurisdiction and which was barred by lapse of time at the date when this section, as amended, takes effect. Provided further, that the court shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to September first, nineteen hundred and twelve, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refiling or previous notice.

* * * * *

§14. Court rules and procedure. The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments, and grant new trials, and except as otherwise provided in said rules

and regulations, or the civil practice act, the practice shall be the same as in the supreme court. Rules of the board of claims or former court of claims, now in force, shall continue to be the rules of the court of claims until changed by such court.

• • • • •

§17. State to be represented by the attorney-general. The attorney-general shall represent the state in all proceedings relating to claims. The attorney-general may designate a clerk in his office to assist in the preparation of cases for trial and to attend a term of the court.

• • • • •

§25. Judgments. 1. The determination of the court upon a claim shall be by a judgment to be entered in a book to be kept by the clerk for that purpose, and signed and certified by him.

2. Within ten days after the entry of the judgment, the clerk shall serve a certified copy thereof on the claimant or his attorney and also upon the attorney-general.

3. If the claim arises in a case where the state seeks to appropriate or has appropriated land for a public use, the judgment shall contain a description of such land.

4. A transcript of a judgment in favor of the state, certified by the clerk of the court, may be filed and docketed in the clerk's office of any county; and upon being so docketed shall become and be a lien upon the property of the claimant in that county, to the same extent and enforceable by execution in the same manner, as a judgment of the supreme court.

5. A final judgment against the claimant on any claim prosecuted as provided in this article shall forever bar any further claim or demand against the state arising out of the matters involved in the controversy.

6. Interest shall be allowed on each judgment of the court of claims from the date thereof until the twentieth day after the comptroller is authorized to issue his warrant for the payment thereof or until payment, if payment be made sooner.

7. But no such judgment shall be paid until there shall be filed with the comptroller a copy thereof duly certified by the clerk of the court of claims together with a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, and a release and waiver by the attorney for the claimant of any lien for services upon said claimant's cause of action, claim, award, verdict, report, decision or judgment in favor of said claimant, which said attorney may have thereon under and by virtue of section four hundred and seventy-five of the judiciary law; and where damages are awarded for the permanent appropriation of land for a public use, there shall also be filed with the comptroller, a satisfactory abstract of title and certificate of search as to incumbrances, showing the person demanding such damages to be legally entitled thereto.

8. The provisions of this section as to limitation of interest shall not apply, however, to judgments paid from the various trust funds or sinking funds of the state, which funds shall be entitled to interest until the twentieth day after an appropriation is available for the reimbursement thereof or until payment, if payment be sooner made.

* * * * *

§28. Deposit of awards for land. If at the time of the appropriation thereof there was any apparent lien or incumbrance on the property appropriated by the state, or on any interest therein, or any dower or other interest which the court for any reason is unable to determine, unless the owners of such lien or incumbrance or such dower or other interest shall consent that their respective interests may be determined by the court of claims, the court shall, and in any other case as justice requires may, in and by its award and judgment direct the comptroller to deposit the amount awarded as compensation for the property appropriated in any bank in which moneys belonging to the fund from which such compensation is payable may be deposited, to the account of such award to be paid and distributed to the persons entitled to the same as ordered by the supreme court on application of any person interested in such award. (Added by L., 1923, ch. 671, in effect May 23, 1923, repealing former §28.)

§28-a. Disposition of amount of award deposited. If the amount awarded is deposited, as provided by section twenty-eight of this act, any person claiming an interest in the fund may apply to the supreme court in and for the county of Albany, for an order of distribution. Such application shall be made by verified petition setting forth the rights of any and all persons who may have, or claim to have, any interest in or lien or encumbrance on, the property so appropriated and the award therefor, and the names and addresses of such persons, if known. Thereupon, such court shall make an order, describing the property so appropriated, directed to the attorney-general of the state of New York and to all such persons and to any others who may be unknown, who have or claim to have, any right, title, interest, claim or demand in or to said appropriated property or said award, requiring them to appear before such court and to present

their claims or demands on account of such appropriation, at a time and place stated in the order, in the city of Albany, not less than thirty days after service of such order, and show cause why a final order of distribution should not be made. If any such persons appear by such petition to be residents of the state of New York, the order shall require personal service of the order thereon. If the petition states that any are non-residents of the state or that the names or addresses of any are unknown, the order shall require the service of the order by publication as provided by section twenty of this act. The court may on the return day hear all persons interested and make a final order of distribution or refer any claim to a referee to hear, try and report. The court may likewise on the confirmation of a report of a referee, after eight days' notice to those who appeared on the return day, make a final order of distribution. The determination of the court and final order of distribution shall, unless set aside or reversed on appeal, be final and conclusive upon the owners or other persons claiming any interest in or lien or encumbrance on the property so appropriated and the award therefor. (Added by L., 1921, ch. 474; amended by L., 1923, ch. 671, in effect May 23, 1923.)

§29. **Appeals generally.** Either party may appeal from an order or judgment of the court of claims to the appellate division of the supreme court of the third department, except that appeals from orders or judgments relating to claims which arose in the fourth department shall be taken to the appellate division of such fourth department. The appeal from a judgment may be taken upon questions of law or of fact, or both, or for an alleged excess or insufficiency of the judgment. Upon such appeal, the court may affirm, reverse, or modify the judgment, or dismiss the appeal, or grant a new trial. The provisions of the civil practice act relating to appeals in

the supreme court apply, so far as practicable, to appeals from orders or judgments of the court of claims, except as modified in this chapter.

STATE FINANCE LAW.

Section 49-b, formerly Section 51*.

§49-b. Probable life of certain works or objects of state debt. In compliance with section four of article seven of the state constitution, it is hereby determined that the probable life of each of the following described types of buildings, structures, acquisitions or improvements, as a work or object, or part of a work or object, for which a state debt shall be contracted pursuant to such section of the constitution, is as follows:

* * * * *

PARK IMPROVEMENT AND DEVELOPMENT.

11. Twenty-five years. Park Improvement and development, including forestry work, fire protection, planting, grading and park equipment.

* * * * *

OTHER IMPROVEMENTS.

* * * * *

Except as may be otherwise provided by law, from time to time, the probable life of any work and construction not covered by the foregoing provisions, and of the acquisition of lands, is hereby determined to be fifty years.

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*N. Y. L., 1924, ch. 23, as amended by L., 1925, ch. 513.

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JAN 6 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS.

WALTER H. POLLAK,
JAMES GIBSON,
Second Assistant Attorney General of New York,
Counsel for Appellants.

WALTER H. POLLAK,
CARL S. STERN,
RUTH I. WILSON,
on the Brief.

GALLO & ACKERMAN, Inc., 142 Liberty Street, 'Phone—Hitchcock 8078-9.

TABLE OF CASES.

PAGES

Adirondack Ry. Co. vs. New York State, 176 U. S., 335 ..... 24, 46n
American Bank vs. Goss, 204 App. Div., 759 33-34

Backus vs. Fort Street Union Depot Co., 169 U. S., 557 ..... 45n
Baron vs. Korn, 127 N. Y., 224 40
Benedict vs. U. S., 270 Fed., 267, 271 Fed., 714, 261 U. S., 294 8
Bloodgood vs. R. R. Co., 18 Wend. (N. Y.), 9 ..... 28n
Bloomquist vs. Farson, 170 App. Div., 64, 222 N. Y., 375 40
Bragg vs. Weaver, 251 U. S., 57 ..... 25, 48
Buffalo, Matter of, 68 N. Y., 167 12

Campbell vs. U. S., 266 U. S., 368 7
Cavanaugh vs. Looney, 248 U. S., 453 48
Chapman vs. Gates, 54 N. Y., 132 ..... 28n
Cherokee Nation vs. Southern Kansas Ry., 135 U. S., 641 ..... 45n
Crozier vs. Krupp, 224 U. S., 290 ..... 25, 28n, 45n, 48
County of Albany vs. Hooker, 204 N. Y., 1 38

Ex parte Young, 209 U. S., 123 48

Flagg vs. Long Island State Park Commission (Moses), N. Y. L. J., August 3, 1926 42
Flagg vs. Moses, 132 Misc., 494, 225 App. Div., 887, leave to appeal denied, N. Y. Ct. of Appeals, April 23, 1929 43
Flood vs. Van Wormser, 147 N. Y., 284 40
Fowler, Matter of, 53 N. Y., 60 12

PAGES

Garrison vs. City of New York, 88 U. S., 196 12

Half Moon Bridge Co. vs. Canal Board, 91 Misc., 600 ..... 31, 32n
Hays vs. Port of Seattle, 251 U. S., 233 24-25

Jerome vs. Ross, 7 Johns. Ch. (N. Y.), 315 ..... 16-17, 28n, 46
Joslin Co. vs. Providence, 262 U. S., 668 ..... 7, 24, 25, 48

Kahlen vs. State, 223 N. Y., 383 ..... 28n, 47-48
Kibbee vs. Lyons, 118 Misc., 172; 202 App. Div., 562; 235 N. Y., 546 ..... 32, 32n
Knapp vs. City of Brooklyn, 97 N. Y., 520 33

Litchfield vs. Bond, 186 N. Y., 66 ..... 21-22, 40
Love vs. Atchison, T. & S. Ry. Co., 185 Fed., 321 41
Lyon vs. Jerome, 15 Wend. (N. Y.), 569 48

Mayor, Matter of, 99 N. Y., 569 ..... 14, 24
Middletown, Matter of, 82 N. Y., 196 13
Mitchell vs. U. S., 267 U. S., 341 7
Muskeget Island Club vs. Nantucket, 185 Mass., 303 8

Newell vs. People, 7 N. Y., 9 ..... 3-4, 4n, 14, 15, 15n

Pauchogue Land Corp. vs. Long Island State Park Commission, 125 Misc., 809 ..... 40n
Pauchogue Land Corporation vs. Long Island State Park Commission, 223 App. Div., 733 26
Pauchogue Land Corp. vs. Long Island State Park Commission, 243 N. Y., 15 ..... 17, 18, 18n, 19, 26, 31, 42
Pauchogue Land Corp. vs. Long Island State Park Commission, 248 N. Y., 635 ..... 17, 18n, 25, 26, 43, 48
Pauchogue Land Corp. vs. Long Island State Park Commission, 278 U. S., 657 ..... 18n, 25

PAGES

Pauchogue Land Corp. vs. New York, Court of Claims, December 21, 1929 ..... 27n
People vs. Adirondack Ry. Co., 39 App. Div., 34 23
People vs. Adirondack Ry. Co., 160 N. Y., 225 ..... 10-14, 24, 28, 28n, 30, 45-46, 46n, 48
People vs. Canal Board, 55 N. Y., 390 ..... 14, 15
People vs. Home Insurance Co., 92 N. Y., 328 36
People vs. Kerr, 27 N. Y., 188 12
People vs. McClellan, 118 App. Div., 177, 188 N. Y., 618 38
People ex rel. Horton vs. Prendergast, 248 N. Y., 215, 278 U. S., 579 48
People ex rel. Hopkins vs. Supervisors, 52 N. Y., 556 ..... 14, 15, 32n, 35-36
People vs. Tremaine, 252 N. Y., 37 36
People ex rel. Jordan vs. Wotherspoon, 94 Misc., 419; 176 App. Div., 947 32
Percy Summer Club vs. Astle, 145 Fed., 53 41
Pokegama Sugar Co. vs. Klamath River Co., 96 Fed., 34 41

Rasweiler vs. Long Island State Park Commission, N. Y. L. J., April 29, 1927 42-43
Rasweiler vs. Long Island State Park Commission, N. Y. L. J., July 9, 1927 43
Rexford vs. Knight, 15 Barb., 627, 11 N. Y., 308 47
Rockaway Pacific Corp. vs. Stotesbury, 255 Fed., 345 ..... 27, 28, 28n, 32n
Rogers vs. Bradshaw, 20 Johns. (N. Y.), 735 ..... 16, 17, 28n, 44, 45, 46

Sage vs. City of Brooklyn, 89 N. Y., 189 ..... 3, 20-21
Secombe vs. R. R. Co., 90 U. S., 108 12
Sharp vs. U. S., 191 U. S., 341 7
Slaughter vs. Mallet Land Co., 141 Fed., 282 41

PAGES

Sweet vs. Rechel, 159 U. S., 380 ..... 24, 45n
Syracuse vs. Hogan, 234 N. Y., 457 ..... 40n

Talbot vs. Hudson, 82 Mass., 417 24

West Point Iron Co. vs. Raymert, 45 N. Y., 703 40
Wheelock vs. Young, 4 Wend. (N. Y.), 647 46
Williams vs. Parker, 188 U. S., 491 ..... 45n

TEXTBOOKS.

	PAGES
Black, Constitutional Law	10
Cooley, Constitutional Limitations [6th Ed.]	10
Cooley, Constitutional Limitations [8th Ed.]	36
Lewis, Eminent Domain	10
Mills, Eminent Domain	10
Nichols, Eminent Domain [2d Ed.]	8
Randolph, Eminent Domain	10
Wigmore, Evidence [2d Ed.]	8

CONSTITUTIONAL PROVISIONS AND STATUTES.

Adirondack Park Act	23, 46
Conservation Law (New York)	19, 46n
Section 50	29-30, 44
Section 59	2-3, 18n, 28n, 29, 31, 44
Section 662	34, 34n, 35n, 37, 39
Section 674	34
Section 692	19n
Section 737	19n
Section 748	34
Section 761	4-5, 22, 29, 30, 31, 33, 44
Section 777	19n
Article XVI, Part 9	5
Long Island State Park Act	19
New York Condemnation Law, Sec. 24	22-23, 44
New York Constitution:	
Article I, Section 6	11
Article I, Section 7	11
Article III, Section 1	32n
Article III, Section 21	9, 15, 18, 18n, 23, 27, 32n, 35
Article VII, Section 4	9, 9n, 14, 15n, 16, 18n, 20, 32n
Article VII, Section 10	32n

PAGES

New York Executive Law, Section 62 38

New York Session Laws:

L., 1817, Ch. 262 (Erie Canal Act) 44, 45, 47
L., 1851, Ch. 485 ..... 14, 14n
L., 1868, Ch. 631 21
L., 1872, Ch. 700 15
L., 1872, Ch. 740 15
L., 1900, Ch. 170 (Palisades Interstate Park Act) 31, 34
L., 1902, Ch. 473 22
L., 1903, Ch. 147 (Barge Canal Act) 32n
L., 1921, Ch. 688 (Amend't to Barge Canal Act) 32n
L., 1917, Ch. 130 .....
L., 1920, Ch. 923 (Condemnation Law) 23n
L., 1923, Ch. 246 (Amend't to Condemnation Law) 23n
L., 1924, Ch. 602 (Bond Referendum Act) 18, 31, 33, 34
L., 1926, Ch. 16 (Appropriation Act of 1926) 8, 34, 35n, 37
L., 1928, Ch. 75, Part V (Appropriation Act of 1928) 35, 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, *Appellants,* against Sparkill Realty Corporation and Standard Trap Rock Corporation, *Appellees.*	No. 336.

On Appeal From the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR APPELLANTS.

I.

Replying to appellees' introductory statement (pp. 1-13).

Counsel say (appellees' brief, p. 2) that

> "in the absence of funds appropriated for the purpose, the State Constitution forbids payment of any judgment out of any funds in the State Treasury."

The Constitution of the State of New York contains no such prohibition, either express or implied. The statement is based on a complete misapprehension of the eminent domain power and the limitations imposed upon it by the New York Constitution, as authoritatively settled by the New York Court of Appeals (*infra*, pp. 10-13).

Counsel assert (appellees' brief, p. 2) that

> "The Conservation Law of New York has not been held void."

Nevertheless, the decree so recites (R., 82; and as to Section 59, see opinion, R., 94).

Counsel say (appellees' brief, p. 2) that

> "No statute of New York pledges or authorizes a pledge of the entire or any portion of the credit of the state to pay for property taken in eminent domain."

Yet this is exactly what Section 59 of the New York Conservation Law does. It provides (in subdivision 7)

that upon filing in the office of the Conservation Department and in the office of the Comptroller a certified copy of the judgment that the owner has recovered in the Court of Claims, with a certificate of the Attorney General showing that this judgment is final,

> "The comptroller *shall* issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount *shall* be paid out of the state treasury." (See appendix to our main brief, p. 26.)

This is not only a direction to the State Comptroller to issue his warrant and to the State Treasurer to make the payment, but a direction that the State itself pay the amount of the Court of Claims judgment. In *Sage* vs. *City of Brooklyn* (89 N. Y., 189, at 200-201) Chief Judge Andrews said:

> "According to common understanding, a direction to the chief financial officer of a city, State or of the general government, to pay money for a public purpose, is a direction that the State, government or municipality pay the sum stated."

It is also a promise on the part of the State to appropriate whatever moneys may be needed in the future to make payment possible. In *Newell* vs. *The People* (7 N. Y., 9) Johnson, J., said that while it is true that "payment cannot be made without further legislative action" (since "an appropriation is always necessary to effect actual payment"), nevertheless the state's "*obligation*

is as complete without the appropriation as with it'' (7 N. Y., at 104).*

Counsel assert (appellees' brief, p. 2) that

> "plaintiff lessee has constructed a stone-crushing plant on the property and stripped a portion of the quarry at a cost of more than one million ($1,000,000) dollars."

Appellees' references to the record—R., 40, 43, 44—show nothing to support the statement that any portion of the quarry has been "stripped." What does appear at R., 44 and elsewhere in the record (R., 44, 47, 48, 50, 53) is frequent reference to the *naturally* exposed face of the cliff, a characteristic feature of the rock formation of the Palisades.

Nor does the record purport to show that the actual "cost" of Standard Trap Rock Corporation's preparation has been $1,000,000. The allegations of the bill are merely that Standard Trap Rock Corporation had subjected itself to liability in excess of $1,000,000 (R., 6). There is nothing to show the actual indebtedness to its contractors at the time of the entry and appropriation. The mere fact that Standard Trap Rock Corporation was under contract to pay $1,000,000 for a finished plant by no means shows that it actually owed this amount when the State's interference terminated the construction contracts and rendered their completion impossible.

At page 4 appellees refer to "Section 761 of the new Conservation Law" as distinct from the sections of that

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*Judge Johnson here pointed out that even as to a funded debt ultimate *payment* depended upon an appropriation by the Legislature. But the obligation was complete and the payment a moral certainty.

As to the *Newell* case see *infra*, p. 14.

law that were taken over from the Palisades Park Act. As a matter of fact all the provisions concerning the Palisades Interstate Park are found in Part 9 of Article XVI of the 1928 Conservation Law, and Section 761 is merely the last section of Part 9 (see pp. 27-34 of appendix to main brief).

At pages 6-7 counsel attempt to make a showing of hardship from the abandonment of the first attempt to acquire the property and the partial erection of the quarry plant by Standard Trap Rock Corporation during the interval before October 10, 1928, when the property was taken by entry and appropriation. We have shown in our main brief (p. 7) the reason for the abandonment of the first attempt to acquire the property—the uncertainty then existing whether it was within the territorial jurisdiction of the Palisades Commission. (That it was the appellees' own attorney who had raised the objection, see R., 60.) We have also shown that there was given to appellees at that time no assurance that the Commission had permanently abandoned the idea of acquiring the property. On the contrary, the attorney for the Standard Trap Rock Corporation who telephoned to Mr. Richards and asked for some amplification of the notice that the condemnation project was abandoned, was told that Mr. Richards "could add nothing to what was stated in the letter *and that he could not predict what the Commission's future attitude would be*" (R., 60; main brief, p. 7).

Counsel refer (p. 7) to the circumstance that appellees "were served with a notice of resolution of the Board

of Commissioners of the Land Office requiring cessation of the dredging at the plant," and to the assertion of Mr. Shaw in his affidavit that "deponent is informed, believes and therefore alleges that this action was taken at the request of defendants, Board of Commissioners of Palisades Interstate Park, who had been informed of the plan for dredging eleven months prior and on or before September 20, 1927."

These references, wholly irrelevant to any issue here, apparently represent an attempt to impute impropriety either to the Land Board or to the Palisades Park Commission. The lands under water were the property of the State and the dredging was a trespass. The Land Board ordered the trespasser to desist. In view of the fact that the State was then contemplating the taking of the property by eminent domain, there was no reason why it should stand by and see the owners' exaggerated claim for damages further increased by the unauthorized dredging of the State's property.

Counsel fall into error both as to the law and the facts in their reference to the statement in Mr. White's affidavit (R., 58) that *among* the quarries which had been closed *before* 1921 by purchase or condemnation, were "quarries which—(unlike the one here that was never completed or operating)—were, at the time of their acquisition, going concerns that had been in operation for years and were earning large profits."

Because Mr. White said that some quarries operated prior to 1921 had made profits, this is construed (brief, p. 10, and again at pp. 70 and 80) as some evidence that this unopened quarry would make profits. But, as we have pointed out (see our main brief, pp. 60, 61) these

anticipated profits do not constitute the basis for determining the value of the land. Appellees could not recover for the loss of their quarry business, even if it were an established one, unless the State took the quarry business as well as the land. In *Mitchell* vs. *United States* (267 U. S., 341, cited in our main brief, at p. 60), Mr. Justice Brandeis said:

> "The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co.* vs. *Providence*, 262 U. S., 668, 675. Compare *Sharp* vs. *United States*, 191 U. S., 341; *Campbell* vs. *United States*, 266 U. S., 368. No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."

Counsel assert that "the experience of the Commission in connection with the acquisition of other properties, including quarries, does not qualify its members as experts"; that the estimate put upon the property by Mr. White personally and by the Commission as a whole is merely the "conclusion of a party" and that the allegations of value contained in the bill therefore remained uncontroverted (appellees' brief, pp. 9-11).

The rule of law is however to the contrary. Experience in estimating the values of property in a particular locality acquired by a public official in the course of his

official duties, does qualify him to testify as an expert to the value of such property.

Wigmore (2d ed.), Sections 711, et seq.;
Nichols, *Eminent Domain,* §448 (as to public officials, see p. 1177);
Benedict vs. *United States,* 270 Fed., 267, 269, aff'd 271 Fed., 714, aff'd 261 U. S., 294;
Muskeget Island Club vs. *Nantucket,* 185 Mass., 303.

On page 12 of their brief counsel say that obtaining the $600,000 allocation out of the 1924 bond issue money, was a "recognition," by the Palisades Interstate Park Commission "of the necessity under any power for an antecedent appropriation of moneys sufficient to pay an award."

What happened was this:

If the Commissioners desired to use bond moneys to pay for the property, they were required by the 1926 appropriation law (Section 4—see appendix to main brief, p. 48) to obtain the approval of the Governor, the Chairmen of the two financial committees of the Legislature and the State Council of Parks, for the acquisition of this land. They did obtain this approval (R., 54).

They were also required by Section 8 of the same law (see appendix to main brief, p. 51) to obtain from these officials a certification to the State Comptroller of the estimated amount required for the acquisition. They did obtain this certificate of the estimated amount (R., 55),—and that is the allocation referred to.

On no possible theory can this compliance with *statutory* rules be construed as a recognition of any *constitutional* requirement.

II.

Replying to Point I of appellees' brief (pp. 14-20).

Appellees in their first point quote the referendum provision of the New York Constitution (Art. VII, §4)* and the provision requiring appropriation by the Legislature before State funds can be paid out (Art. III, §21) and they cite various cases concerned with the interpretation and application of these provisions (appellees' brief, pp. 14-18) as if some restriction or limitation upon the State's power of eminent domain were to be found there.

The *appropriation* provision has nothing to do with the eminent domain power—it simply prescribes that before any money belonging to the State shall be actually paid out the legislature must appropriate it for the purpose for which it is to be paid. *It imposes no limit upon the power or the duty of the legislature to appropriate moneys from the State Treasury to pay Court of Claims judgments* (main brief, pp. 36-37).

And the *referendum* provision has nothing to do with the eminent domain power and imposes no restriction upon it. It has to do solely with the borrowing of money upon the credit of the State or upon the pledge and security of its future revenues, and this section has always been recognized by the New York courts as restricting the creation of debts in this sense and in this sense only.

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*Counsel say we have not printed the whole of this section in the appendix to our main brief. They are mistaken. An amendment submitted to the people in 1920 (effective January 1, 1921) eliminated the part which counsel think we failed to print, and made other changes.

People vs. *Adirondack Railway Co.* (160 N. Y., 225) dispels any idea that the appropriation and referendum clauses have anything to do with the eminent domain power. Judge Vann, in his great opinion fully discussed the State's right of eminent domain as one of the inherent and essential prerogatives of sovereignty, and established beyond any possibility of doubt that the New York Constitution imposes no restriction or limitation upon the exercise of that sovereign power by the State except the requirements of just compensation and due process. Judge Vann said (160 N. Y., at 236-239, 241):

> "The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself. (Black Cons. Law, §123; Cooley Const. Lim., 524; Eminent Domain by Randolph, 77; Lewis, §3; Mills, §11.) Each is a peculiar power wholly independent of the others, and not one of them requires the intervention of a court for effective action by the state. In the case of eminent domain, when the state is not itself an actor, compensation for property taken, unless the amount is

agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary except as provided by statute. (State Const., art. 1, §7.)

"The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation. The state has all the power of eminent domain there is and all that any sovereign has subject to the limitations of the Constitution. Although exercised under our first Constitution, it is not mentioned therein, and it is now mentioned only for the purpose of limitation. The language of the Revised Constitution is as follows: 'No person * * * shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation'; and 'when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.' (Const., art. 1, §§6 and 7.) This language, which presupposes the existence of the power outside of the Constitution, simply regulates the right to use it. It does not confer the power, but recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the state acts for itself, but marks out certain boundaries which may not be crossed, even by the state. Within those boundaries, the state, acting through that department which exerts the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with

by either of the other departments of government. (*Garrison* vs. *City of New York*, 88 U. S., 196.) All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent. (*People* vs. *Kerr*, 27 N. Y., 188; *Matter of the City of Buffalo*, 68 N. Y., 167.) While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor. *There is no limitation upon the exercise of the power except that the use must be public, compensation must be made and due process of law observed.* (*Secombe* vs. *R. R. Co.*, 90 U. S., 108; *Matter of Fowler*, 53 N. Y., 60, 62.)*

"Now, what does the phrase 'due process of law' mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? * * * In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the state has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where of necessity, if there is any action at all, it must be arbitrary. The state needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public

*Our italics.

authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state unless some statute requires it. (*Matter of Village of Middletown*, 82 N. Y., 196, 201.) There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the Constitution."

Addressing himself specifically to the just compensation and due process requirement, Judge Vann went on to say (at 241):

"Just compensation, to be ascertained in the absence of agreement by an impartial tribunal, is an absolute right belonging to the owner of the property taken, but it is not necessary to provide for payment in advance, if a certain, convenient and adequate source and means of payment is provided. A distinction is made between direct action by the

state and action under power delegated to a corporation created by the state, as the one is presumed to be solvent while the other is not. Where, as in this case, the treasury of the state is pledged to meet the claim, payment need not be concurrent with the taking. (*Matter of Mayor, etc.*, 99 N. Y., 569.)"

Incoherent quotations from *Newell* vs. *The People*, 7 N. Y., 9; *People of New York* vs. *Canal Board*, 55 N. Y., 390; and *People ex rel. Hopkins* vs. *Board of Supervisors*, 52 N. Y., 556, at pages 16-18 of appellees' brief only serve to reveal still further counsel's failure to distinguish between the provisions of the New York Constitution with respect to the appropriation of public money, with respect to the creation of floating debts, and with respect to the eminent domain power.

Newell vs. *The People* seems to be relied upon because it held that the provisions of chapter 485 of the New York Laws of 1851* constituted altogether a "single scheme for raising money on the faith of which capital is invited to assist the State" (Opinion of Johnson, J., p. 106), and that, having no referendum provision, it violated the referendum requirement of the New York Constitution (now article VII, §4, of the present constitution).**

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*"An Act to provide for the completion of the Erie Canal enlargement and the Genesee Valley and Black River Canals."

**The passages quoted in appellees' brief (pp. 16-17) are concerned with the attempt in the final section of the act to evade the constitutional requirement of a referendum by the provision that the "state shall in no event be liable to make up any deficiency of revenue, or to redeem the canal revenue certificates in any other manner than out of the canal revenues of the state" and further that "the certificates to be issued under this act shall in no event or contingency be so construed as to create any

(*Footnote continued on next page.*)

People of New York vs. *Canal Board* has no more to do with the eminent domain power than the *Newell* case. The action there brought by the attorney-general was to enjoin the Canal Board and a contractor who had done work on the canal from proceeding (under chapter 740 of the Laws of 1872) to inquire whether the cost of the work done had exceeded the prices paid, and if so what the difference was. It was held that the action could not be maintained, the Court of Appeals being of the opinion that the statute was constitutional (55 N. Y., at 400), and also that, regardless of the constitutional question, it would not lie, because the bill presented only "a theoretical or speculative question, which, whatever its merits, can only be judicially decided when facts arise giving the court jurisdiction, and making a decision necessary" (55 N. Y., at 397).

People ex rel. Hopkins vs. *Board of Supervisors*, likewise has nothing to do with any question of eminent domain. There Chapter 700 of the New York Laws of 1872 was held unconstitutional because (1) it made appropriations, yet failed to comply with the requirement of the State constitution (now article III, section 21), that every appropriation law shall "distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum," and (2) it contained a section authorizing the creation of a state debt to pay the appropriations made, which were for a

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(*Footnote continued from p.* 14.)

debt or liability against the state or the people thereof within the meaning of" the referendum requirement of the state constitution (7 N. Y., at 18).

The three judges who wrote for the majority of the Court of Appeals all agreed in allowing these evasive provisions no legal effect (pp. 93; 106-7; 115, 116 and 119) and in holding that the statute did create a debt within the meaning of the referendum provision (pp. 87; 92; 102-5; 115-6).

great variety of purposes, and so failed to comply with the requirement of the referendum provision that a law creating a State debt shall be for a "single work or object, to be distinctly specified therein" (see art. VII, §4, appendix to main brief, p. 5). As to this case see *infra*, pp. 35-36).

After quoting from these utterly irrelevant cases, counsel then go on to assert (appellees' brief, p. 19) that

> "the cases cited establish that neither the legislature nor the officers and agents of the State, or all combined can pledge its credit."

The exact contrary is true where the eminent domain power is involved.

More than a century ago, as we know, Chancellor Kent laid it down as a fundamental proposition (*Rogers* vs. *Bradshaw*, 20 Johns., 735, at 744-5) that whenever "a public officer enters upon private property *by virtue of legislative authority,*" the owner's constitutional right to compensation "*imposes it as an absolute duty upon the legislature to make provision for compensation.*" In a later decision of the same year—1823—Chancellor Kent reasserted the power of state officials acting within the scope of their authority to pledge the state's credit and impose upon the legislature the duty to provide just compensation for those whose property has been taken pursuant to an exercise of official power which the legislature has authorized (*Jerome* vs. *Ross*, 7 Johns. Ch., 315, 344):

> "If the owner is paid for the damage occasioned by the temporary use of his lands, it is all that he can justly require, and this compensation the state

is bound to give him. If the act we are examining has omitted to make any provision for the assessment and payment of damages for such temporary use, it may have escaped the attention of the legislature, or the case may have been deemed, at the time, immaterial and unimportant. The omission, however, if it be one, does not prevent the right of the commissioners to enter and use the land; nor prevent the just claim of the owner upon the commissioners or the legislature for his reasonable compensation. The commissioners are not trespassers, when the act authorizes them to enter, if they enter before the damages are paid for. This was so understood and declared, in *Rogers* vs. *Bradshaw*, already referred to. The claim for compensation arises after the use has been had; and the damages cannot well be assessed before they have arisen. Whatever, therefore, may be the better construction as to the mode of ascertaining and enforcing the compensation it does not affect the right of the commissioners to enter, nor justify the interference of a Court of equity to interdict their entry."

And a century later the Court of Appeals in both its *Pauchogue* opinions (243 N. Y., 15, cited and applied in 248 N. Y., 635) reasserted this view. Although the statute authorizing the Long Island Commission to exercise the eminent domain power by entry and appropriation imposed the condition that there first be moneys on hand or appropriated, it was declared that if the officials acted in good faith in deciding that the funds on hand were sufficient, *the entry and appropriation would be valid and binding even though it later turned out that they were mistaken and that the property was worth more than the amount on hand.* In that event, *"the credit of the State may be pledged to meet the deficiency"* (243 N. Y., at 27).

Thus it is only by reading the New York decisions upon clauses of the New York Constitution which have nothing to do with the eminent domain power, that appellees' counsel are able to make the assertion that neither the legislature nor the officers of the state can pledge its credit, to pay for property which it takes and uses.*

Counsel say that in the first *Pauchogue* decision (243 N. Y., 15) the Court of Appeals "recognizes that no money can be paid out of the treasury of the state or any funds under its management except in pursuance of an appropriation by law (Section 21, Article III)." This reference to the appropriation provision in the State constitution was made in discussing the question whether the bond issue act of 1924 had by itself—and without further legislation—put at the disposal of the Long Island Commission the $1,000,000 fund which it provided for the use of that commission. (As that enactment itself declared that the bond issue moneys were to become available only "after appropriation by the legislature" [L., 1924, Chap. 602, §3; appendix, p. 37], the Court of Appeals held against the Commission, citing also the constitutional provision.)

Nowhere in Judge Pound's opinion was it remotely suggested that Article III, Section 21, operated as a limitation on the power of public officials to pledge the State's credit for property taken. On the contrary the opinion in so many words establishes that there was no

*The Pauchogue Land Corporation both in its two appeals to the Court of Appeals and in its certiorari application to this Court urged that Article III, Section 21 and Article VII, Section 4 qualified the pledge of the State's general credit given by Section 59, and cited many of the same decisions appearing in appellees' brief (see especially the statement of points appearing in the opinion in 243 N. Y., 15).

constitutional limitation upon the Long Island State Park Commission (main brief, pp. 73-74).

Counsel say (appellees' brief, pp. 19-20) that in the *Pauchogue* case (243 N. Y., at 23) Judge Pound commented upon the "danger" of the eminent domain power. The comment was not, however, any part of Judge Pound's discussion of the constitutional question. It was incident to the inquiry whether the eminent domain power, in its full constitutional scope, had been conferred upon the Long Island Commission, or whether that power was conditioned and restricted by the terms of the Long Island Park Act.

With the question why the Legislature imposed upon the Long Island Commission a limitation to "moneys on hand or appropriated" while it imposed no such limitation upon the Palisades Commission, this Court has nothing to do,—though it may be reiterated that the Palisades Commission is the only *interstate* commission, and it may be added that the area within which it can exercise its eminent domain power is strictly defined by the natural features sought to be preserved (appendix, pp. 29-30). It is sufficient, then, simply to re-assert that in every instance where the Legislature has imposed upon any of the park commissions a limitation to funds available, it did so in express language in the act creating that commission,—language now appearing in the Conservation Law.*

*See, for example, as to the Long Island State Park Commission, Conservation Law, Section 777, quoted in our main brief, page 32; as to the Allegany Commission, §692; as to the Taconic Commission, §737.

III.

Replying to Point II of appellees' brief (pp. 20-40).

Counsel say (appellees' brief, p. 20) that

> "The phrase 'pledge of general credit' arose when statutes were first enacted which vested title to land taken in eminent domain prior to actual payment of compensation. *It was soon established in New York under its constitution that such a pledge must amount to a lien upon a specific fund antecedently appropriated.*"

Here again the confusion between the constitutional provisions regulating funded debts of the State, and the State's right of eminent domain, is complete, as the immediate reference to "the cases cited in Point I, *supra*," confesses. For those cases, as we have seen, had to do with the interpretation and application of the provisions of the New York Constitution now found in Article VII, §4, not at all with the eminent domain power.

Counsel cite (appellees' brief, pp. 20-22) the well-known case of *Sage* vs. *Brooklyn*, 89 N. Y., 189, as authority for this supposed constitutional requirement of "a lien upon a specific fund antecedently appropriated." The case held just the opposite:

The property there in question had been taken under a statute which provided for the widening of a street, the appointment of commissioners to estimate the expense and the damage of the land owners, and to apportion and assess the same upon the property benefitted. Payment of the commissioners' award to the plaintiff was refused by the city treasurer on the ground that the fund derived from the assessments collected had been exhausted by claims previously presented. Plaintiff

then brought this action against the City of Brooklyn "to recover the award, as a debt owing by the defendant" (89 N. Y., at 194), and had judgment which the General Term and the Court of Appeals affirmed. Chief Judge Andrews, writing for the Court of Appeals, held the direction contained in the statute "that the comptroller shall pay the land damages," to be "absolute and unqualified," (not merely "a direction to pay them out of the assessments when collected or out of a particular fund" [199]), and a direction by the State Legislature to the City to pay the amount of the award which the City was bound to obey. He said (p. 201):

> "The duty of payment imposed by the act of 1868, is a corporate duty, and one from which the city can be relieved only by performance."

The case therefore is far from holding what appellees cite it for—that "the pledge [of the State's credit] must be enforceable against an existing fund" and if the "existing fund" is inadequate the appropriation is invalid. What it held was, on the contrary, that although the fund that was expected to afford compensation had proved insufficient, nevertheless the owner was entitled to full compensation, and the city was obliged to pay full compensation.

Litchfield vs. *Bond* (186 N. Y., 66) is cited and quoted (appellees' brief, pp. 22-3), but is not at all in point. The defendants there—the state engineer and his assistants—entered upon plaintiff's forest land and cut the trees on a strip more than three miles long and from three to eight feet wide (p. 71), and were threatening to continue the devastation. In the action brought to enjoin

them they pleaded that they were acting under the authority of the law providing for a survey of county boundary lines then in dispute. Werner, J., said that if their acts went "beyond the necessary incidents of a governmental survey" so that they involved "the taking of plaintiff's private property for an alleged public use, the state is liable if the taking is authorized by its legislative direction," while on the other hand "the trespassers are liable if there is no such authority." Examination of the statute showed the existence of no such authority,—

> "Even under the most liberal reading of the statute now under consideration (L., 1902, ch. 473) it is impossible to find in it a single word or sentence indicating that the state proposed to exercise its right of eminent domain or to make compensation for private property taken or destroyed."

In arguing against the entry and appropriation practice and its use by the Palisades Commission under Section 761 of the Conservation Law, counsel point with approval (pp. 24-5) to a provision formerly contained in Section 24 of the New York Condemnation Law. The provision thus commended is a provision which used to impose upon the condemnor in New York—if he wished to take possession in advance of the determination and payment of compensation—the duty of "depositing with the court the sum stated in the [landowner's] answer as the value of the property." As a matter of fact the New York Condemnation Law no longer gives the landowner any such right to demand an exorbitant deposit. Section 24 was amended in 1923 and this provision—which appellees mistakenly regard as still in effect—

eliminated. The present requirement is simply that the court shall determine the amount of the deposit upon notice to the parties.*

Counsel say (appellees' brief, p. 25) that the Adirondack Park Act was held to be constitutional because of a $600,000 appropriation which that statute originally carried. It was while this appropriation was in effect that the Appellate Division of the New York Supreme Court held the statute invalid (39 App. Div., 34), and it was after the original appropriation had lapsed (N. Y. Constitution, Art. III, §21) that the Court of Appeals and this Court declared it valid, and valid without any

*This section of the Condemnation Law in its present form (N. Y. L., 1920, ch. 923, §24, as amended by L., 1923, ch. 246) is as follows:

> "When it appears to the satisfaction of the court at any stage of proceedings that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, *upon the deposit with the court of a sum to be fixed by the court* upon a notice to the parties of not less than eight days and such sum when so fixed and paid shall be applied, so far as it may be necessary for that purpose, to the payment of any award that may be made, with interest thereon from the date of the entry of the petitioner upon such real property, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant."

inquiry whether there had been a reappropriation or whether or not it had been exhausted in the acquisition of other lands.

Both Judge Vann's decision in the Court of Appeals (160 N. Y., 225) and Chief Justice Fuller's decision in this Court (176 U. S., 335) went upon the simple ground:

> "This act fulfills these requirements [of due process] in that the state treasury is the source of payment" (176 U. S., at p. 350; main brief, pp. 23-24; 72-73).

Counsel (appellees' brief, pp. 23-4) refer to cases where compensation was assured by a right of action against a city or a private corporation, against which execution can issue (*Sweet* vs. *Rechel*, 159 U. S., 380; see appellees' brief, pp. 23-24, and *Matter of App'n of Mayor, etc., of the City of N. Y.*, 99 N. Y., 569).

But the certainty of payment when the general credit of the State is pledged and an action in the State Court of Claims permitted is no less than where execution can issue against a municipal or other corporation. For the presumption "that the State will keep its faith inviolate and honestly fulfil all its obligations" (*Talbot* vs. *Hudson*, 82 Mass., 417, 432) is the completest possible assurance that the judgment against the State will be paid (and see other cases cited in our main brief, pp. 45-7).

And this Court in so many words has declared that the rule is the same, whether the taking is "by a State or one of its municipalities" (*Joslin* vs. *Providence*, 262 U. S., 677; *Adirondack Ry. Co.* vs. *New York*, 176 U. S., at 349-50).

Appellees try to distinguish *Hays* vs. *Port of Seattle* (251 U. S., 233) on the ground that the property taken

in that case was not land, but a right of contract. But the destruction of the contract right was a "taking" of property and this was recognized in the decision. Mr. Justice Pitney said:

> "Assuming he had property rights and that they were taken, it clearly was done for a public purpose, and there was adequate provision for compensation * * * * * * this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking" (251 U. S., at 238).

There can be no distinction between the taking of a contract right or a patent right or land. All are "property" and all are protected and in the same degree by the same constitutional principle. And this Court has recognized as of course that there is no distinction.

See the citation of *Crozier* vs. *Krupp* in *Bragg* vs. *Weaver;* the reference to *Bragg* vs. *Weaver* in *Hays* vs. *Port of Seattle;* the reference to all three of these cases in *Joslin Co.* vs. *Providence.*

The second decision of the New York Court of Appeals in the *Pauchogue* case (248 N. Y., 635, c. d., 278 U. S., 657) is discussed at some length (appellees' brief, pp. 34-6) and with a complete misunderstanding of the facts involved and the questions adjudicated. Thus, at page 35, counsel say that "it was shown at the trial that the amount of the Heckscher gift was more than the plaintiffs had been willing to accept at the outset of negotiations." The Pauchogue Land Corporation had never at any time been willing to accept $250,000 for the

property; in its complaint it alleged a value of $800,000 (see record on appeal, 248 N. Y., 635, at fol. 43); in its brief as appellant in the Court of Appeals (Point IV, p. 55), it contended that the testimony at the trial showed the value to be in excess of $1,000,000; its petition to this Court for certiorari (p. 4) claimed a value of upwards of $750,000. The Pauchogue Land Corporation was in fact offered the whole amount of the Heckscher gift, $262,000, and indignantly rejected the offer, as the record in the *Pauchogue* case makes wholly plain.*

Counsel say more than once (appellees' brief, pp. 35, 36), that "any substantial federal question left the [*Pauchogue*] case when the Court found the property not worth more than the moneys on hand." But there was no such finding by any court (see record on appeal, fol. 4501; 223 App. Div., 733; 248 N. Y., at 636).

On the contrary, the trial court, without submitting to the jury any question arising from the vast differences in the estimates of value, ruled as matter of law that the appropriation made after the Heckscher gift had been received was valid. And this ruling made as matter of law the Court of Appeals sustained, saying that "the property in suit has been lawfully appropriated" (248 N. Y., 636).

The Court of Appeals in this second decision wrote no opinion but simply cited and applied its earlier ruling in the same case in 243 N. Y., 15. But counsel are wholly wrong in saying that no constitutional question was involved. On the contrary, the determination by the trial court that as matter of law the presence or absence of funds actually sufficient was immaterial so

*The Pauchogue Land Corporation's predecessor in title had been willing to sell the property for $250,000 and this is doubtless the source of appellees' mistake.

long as the commissioners acted in good faith, left open the identical constitutional question which had been urged on the first appeal and which is urged in the case at bar. And this constitutional question the Pauchogue Land Corporation on its second appeal to the Court of Appeals and in its petition for certiorari and brief in this Court urged with the utmost elaboration and emphasis. The Court of Appeals in its second decision found a complete answer to the constitutional arguments in its first opinion. And the principle laid down in the first opinion that "the credit of the State may be pledged to meet the deficiency" is the principle that in fact has been applied in the determination of the Pauchogue Company's claim against the State. That company, after the failure of its certiorari application here, tried its claim in the Court of Claims. Asserting a value in its complaint of $1,468,000, it, in fact, recovered judgment in the sum of $275,000,—which was more than the $262,000 that Mr. Heckscher had made available and that the Commission had on hand. The credit of the State has in fact—as Judge Pound forecast—been "pledged to meet the deficiency."*

Counsel say (appellees' brief, p. 38) that *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345) "settles all the questions in the present suit."

It is indeed the only decided case to which appellees have ever been able to refer where it was thought by any judge that Article III, §21 of the New York Constitution was in any sense a limitation of the State's power of eminent domain,—a proposition clearly wrong upon principle, and upon the express definition of the eminent

*The decision of the New York Court of Claims was rendered on December 21, 1929.

domain power under the New York Constitution by Judge Vann in the *Adirondack Ry.* case (*supra*, pp. 10-13). All that can be said for the *Rockaway Pacific* decision we have said in our main brief (pp. 43-4),—that it is defensible by reason of the peculiarity of the statute there involved, which intentionally omitted the State's promise to pay the Court of Claims judgment.*

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*The decision in the *Rockaway Pacific* case did not go upon any question of the *Federal* due process requirement. There is no reason to doubt that all the three judges recognized the sufficiency under the Fourteenth amendment of an express pledge of the State's credit:—obviously, Judge Hough who sharply dissented; hardly less clearly Judge Rogers who cited *Crozier* vs. *Krupp* as settling the law in "the Supreme Court of the United States" (353); probably Judge Ward who declared the "decisions of the Federal Courts" inapplicable (p. 348) and the problem one to be determined by New York State decisions.

It was as matter of New York law that Judge Ward found invalid a statute which contained no pledge of the State's credit and which, as he put it, "goes no further in protection of the landlord than to provide the manner in which the amount of his compensation shall be ascertained" (pp. 348; see our main brief, pp. 43, 44).

While the result reached in the *Rockaway Pacific* case was likely enough correct in view of the intentional omission of the state's promise to pay for the land, some of Judge Ward's expressions concerning the State Court decisions were mistaken. His prime reliance is upon a dictum of Chancellor Walworth in *Bloodgood* vs. *Railroad Co.*, 18 Wend., 9, not adopted by the majority of the Court which reduced their conclusions to a formal "resolution" (pp. 77-78). In the leading case of *Chapman* vs. *Gates*, 54 N. Y., 132, the Court of Appeals in terms declared that Chancellor Walworth's declarations were "not really involved in the case" (145) and that "the principle was decided" the other way by Chancellor Kent in *Rogers* vs. *Bradshaw* (143). While in view of the *Adirondack Railway* case and Chancellor Kent's decisions in *Rogers* vs. *Bradshaw* and *Jerome* vs. *Ross*, Judge Ward was in error in thinking that the New York due process rule was, even at the time he wrote, in any respect different from the rule of this Court, it should be said that the principle of *Crozier* vs. *Krupp* was not by name adopted in the New York Courts until *Kahlen* vs. *State* was decided (223 N. Y., 383) and *Crozier* vs. *Krupp* cited (at 389,—a year after the decision in the *Rockaway Pacific* case).

IV.

Replying to Point III of appellees' brief (pp. 40-66).

At page 41 counsel say that $100,000 out of the $600,000 allocation was reserved for other land. There is nothing in the record to support the assertion. And see the wording of the allocation certificate (R., 55) discussed in our main brief, at pages 10, 12.

Counsel criticize (p. 41) Mr. White's statement (R., 79) that the Commission at the time of the entry and appropriation had available assets outside of the bond moneys "which I am informed and believe were of a value in excess of $500,000."

The criticism is groundless. The nature of this property as explained by Mr. White,—"moneys, securities and other properties"—shows that a precise statement of the amount on hand at the moment—such as might be given if the property consisted of a bank deposit—was here impossible.

At page 42 counsel assert that the power of entry and appropriation under section 59 of the Conservation Law, given to the Palisades Interstate Park Commission by section 761 of the Revised Conservation Law of 1928, was subject to the condition "when moneys have been *appropriated* therefor," and argue that the Long Island Commission had a greater license, since it was permitted to acquire lands from moneys on hand as well as moneys appropriated. The limitation which counsel thus seek to impose upon the Palisades Commission is found, as their footnote reference shows, in Section 50 of the Revised Conservation Law (see p. 22 of the appendix to our main brief). There is needed only a reading of

subdivision 2 of this section, with subdivision 30 of the same section (see again p. 22 of the appendix to our main brief) to understand at once that this is a limitation put upon the power of the conservation commissioner as an independent agency in the acquisition of land for the State, and that it is not intended that any part of section 50 shall operate as a limitation or restriction or diminution of the authority of the Palisades Interstate Park Commission. The misapprehension was fully discussed in our main brief at pages 40-42. It may however, be instructive to refer again to the opinion of Judge Vann in *People* vs. *Adirondack Ry. Co.* (160 N. Y., at p. 230), where the nature and general locality of the "forest preserve" is made perfectly clear.

The attempt to read Section 50 into Section 761 completely overlooks the history of the subject and the obvious intention of the Legislature. The Legislature could not have thought of limiting the Palisades Commission to "moneys *appropriated,*"—which is the limitation on the Conservation Commissioner in Section 50 and the only limitation even suggested. What possible object would the Legislature have in denying the Commission the use of those munificent gifts which had helped to make the great Palisades system possible? (See Record, p. 59.)*

On the same page (p. 42) counsel assert that the Palisades Interstate Park Commission is not, like the Long

*The Long Island Commission was not limited to "moneys *appropriated*" but to "moneys or property *on hand or* appropriated."

At the very moment of writing into the Conservation Law the provision giving the Palisades Commission the power of entry and appropriation, the State was successfully maintaining in the courts its right to use moneys obtained from a private source as the basis for entry and appropriation for park purposes (*Pauchogue* vs. *Long Island State Park Commission*).

Island Commission, given the power to acquire land by entry and appropriation from "moneys on hand."

This reference to the "power" of the Long Island Commission is in reality a reference, as the *Pauchogue* decision in 243 N. Y., made perfectly clear, to a statutory restriction and limitation upon the eminent domain power as it exists under the State Constitution and under the general provisions of section 59 of the New York Conservation Law. The Palisades Commission is given the entry and appropriation power under section 59 *without* these restrictions (see section 761 of the New York Conservation Law of 1928; appendix to our main brief, pp. 34, 23; main brief, pp. 5-6, 32, 40-2).

Appellees' argument (appellees' brief, pp. 42-67) in support of the contention that none of the bond moneys provided by the Referendum Act of 1924 could be used by the State Park Commission for the acquisition of land by entry and appropriation can be reduced to the following propositions: (1) That referendum laws cannot be changed or modified in respect of basic requirements by subsequent legislation; (2) that Section 761 of the Revised Conservation Law was not an amendment of the Palisades Park Act, and (3) that the reference to "Chapter 170 of the Laws of 1900, as amended" in the Bond Referendum Act could include only amendments to the Palisades Park Act up to the date of the Bond Act.

(1) For the proposition that referendum laws cannot be changed or modified by subsequent legislation there is cited only a decision of the Trial Term of the New York Supreme Court, *Half Moon Bridge Co.* vs. *Canal Board*, 91 Misc., 600 (appellees' brief, pp. 43, 58-60). Later decisions of the Appellate Division and the Court of Appeals establish that referendum acts are

amendable by the Legislature in matters which affect the details of the plan and the mode of execution, and thus do not change the central purpose of the project as approved by the People.

People ex rel. Jordan vs. *Wotherspoon*, 94 Misc., 419, aff'd 176 App. Div., 947;
Kibbee vs. *Lyons*, 118 Misc., 172, aff'd 202 App. Div., 562; aff'd 235 N. Y., 546.

In the *Jordan* case, the Legislature changed the location of a canal course specified in the referendum act as *north* of certain railways to one *south* of those lines; in the *Kibbee* case the Legislature struck out a spur for which the referendum act had made express provision. The Court sustained the enactment in each case.*

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*The opinion of the Appellate Division in the *Kibbee* case, which the Court of Appeals affirmed without opinion, is instructive:

> "We think the above act amending the Barge Canal Act was a lawful exercise of the legislative power lodged in the Senate and Assembly. Article 3, section 1, of the Constitution provides: 'The legislative power of this State shall be vested in the Senate and Assembly.' The legislative power rests exclusively in the Senate and Assembly; except so far as the Constitution itself has placed it otherwhere, the Senate and Assembly cannot release its power, nor delegate it to another. Our State Constitution contains no general provision for submitting acts of the Legislature to a referendum. The only sections of our Constitution which have a bearing here are sections 4 and 10 of article 7 above quoted, and they are intended to put restrictions upon the legislative power in respect to creating an indebtedness in behalf of the State and to limit the expenditure of State moneys borrowed to the single work or object distinctly specified in the referendum act. They put no other restriction upon the power of the Legislature to amend any act which has been approved by the votes of the people" (202 App. Div., at 566).

In the Court of Appeals in the *Kibbee* case, the unsuccessful appellants cited the same authorities (*Half Moon Bridge Co.* vs. *Canal Board*, 91 Misc., 600; *People ex rel. Hopkins* vs. *Board of Supervisors of Kings County*, 52 N. Y., 556; 561; *Rockaway Pacific Corp.* vs. *Stotesbury*, 255 Fed., 345, 348), which appellees here cite.

What the People approved at the general election of 1924 was not at all the proposition that the Palisades Interstate Park Commission should employ the condemnation process exclusively and not be permitted to use any of the bond money for land taken by entry and appropriation. What the People did approve was the general park plan. The question submitted and answered in the affirmative was,

> "Shall * * * 'An act making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified state park system for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four' be approved?" (L., 1924, ch. 602, §7—appendix to main brief, p. 40.)

(2) The contention that Section 761 of the Revised Conservation Law cannot be called an amendment of the Palisades Park Act ignores the well understood and commonly accepted meaning of the term. "Amendment" is commonly and properly used in referring to new provisions included in revisions or codifications of the existing law on a given subject. (See cases cited in our main brief, at pp. 51-2.)

(3) Counsel cite and quote (appellees' brief, pp. 51-52) cases like *American Bank* vs. *Goss* (204 App. Div., 759, 760) and *Knapp* vs. *City of Brooklyn* (97 N. Y., 520). In these cases it is said to be "a well settled rule of interpretation of statutes" that where one law is incorporated by reference in a subsequent law, the reference is deemed

to include the law referred to with all its amendments then in existence, but not amendments subsequently made "unless a contrary intention is clearly manifested."

This rule might be applicable if in the Bond Referendum Act the words "as amended" had not been used in the reference to the Palisades Park Act. Those words are the "clear manifestation" of "a contrary intention,"—the intention to include future amendments.

Observe, for instance, the illustration drawn from the revised Conservation Law itself in our main brief (p. 53) where "as amended" can refer only to future amendments.*

At pages 46-47, appellees quote Section 662 of the revised Conservation Law as declaring that Chapter 16 of the Laws of 1926 is not "to be affected or impaired by this article." This general declaration, reiterating the provisions of the appropriation law of 1926, has no bearing upon a change made not in the appropriation law but in what had been the Palisades Park Act and in what continued to be the portion of the Conservation Law concerned with the powers and duties of the Palisades Commission. And the appropriation act of 1926 thus reiterated, contained the same reference to the Palisades law "as amended" as did the referendum act itself (see Appendix to our main brief, p. 45).**

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*The Court will not have overlooked that appellees' counsel make absolutely no attempt to explain this use of the phrase in this particular sense by the Legislature.

**The purpose of the provision in Section 662 against impairing or affecting the provisions of the 1926 law concerning the acquisitions of land by the park commissions is definitely established by the history of the subject:

After the 1924 referendum had been approved, there was, during the year 1925, disagreement between the Governor and the Legislature

(*Footnote continued on next page.*)

The sole objection raised by the bill to the reappropriation act of 1928 is that it "fails to comply with the requirements of said section 21 of Article III of the Constitution of the State of New York *in that it fails to specify the object to which the sum appropriated is to be applied*" (R., 8).

Counsel now announce (appellees' brief, p. 63) that they object also on various other grounds. It is, however, the case made by the bill that must determine the basic questions of jurisdiction, legal sufficiency and inadequacy of legal remedy.

People ex rel. Hopkins vs. *Board of Supervisors of Kings County*, 52 N. Y., 556, frequently cited by the appellees (see, e. g., 63) has no bearing. That case had to do with original appropriation, not re-appropriation. Many things were confused in the same act,—appropriations to pay deficiencies for unspecified purposes under laws merely referred to by year and chapter; deficiencies in the canal debt sinking fund; the "present acknowledged deficiencies" and the "estimated liabilities of the General Fund." The amount of "the present acknowl-

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(*Footnote continued from p.* 34.)

concerning the terms upon which the bond moneys, after being appropriated, were to be made available to the park commissions. The Legislature in 1925 wished to subject the park commissions to the Land Board and passed two measures to this effect, both of which the Governor vetoed. In 1926 this disagreement was composed and the Legislature, as one of its first acts, passed Chapter 16 of the laws of that year making the appropriations out of the bond moneys and subjecting the commissions merely to the requirement that the Governor and the chairmen of the two financial committees of the Legislature give their approval. The purpose of the reference in Section 662 of the revised Conservation Law was simply to insure that the compromise thus effected in 1926 should not be disturbed and that allocations of bond moneys under that law should continue to require the joint approval of the Governor and the two chairmen.

edged deficiencies," the amount of "the estimated liabilities of the General fund," what the debts were for,—were not stated. In an attempt to make diverse appropriations seem single, they were referred to as "*an* appropriation." The Court said (p. 561):

> "The appropriations are in fact many, and their objects many and diverse, and they cannot be reduced to one, and the objects and works made a unit by the mere dash of a pen or the construction of a sentence."

In the 1928 reappropriation act, the object is specified, the amount is specified. Appellees' contention, therefore, amounts to this: they claim the right to substitute their judgment as to the amount of itemization for that of the Legislature.*

The amount of itemization or detail is a matter for the Legislature to determine (cf. *Cooley,* Constitutional Limitations, Eighth Ed., 300). The Court of Appeals in a very recent opinion (*People* vs. *Tremaine,* 252 N. Y., 27) recognized the discretion of the Legislature in this field, writing to the very case of a statute of original appropriation.

See also the holding in *People* vs. *Home Insurance Co.,* 92 N. Y., 328, 335-337, that where the State constitution provides "that a tax law shall distinctly state * * * the object to which it is to be applied" a statement of the object as "the payment of the ordinary and current expenses of the State" will be upheld as sufficient.

It is thought by appellees that the Palisades Commission, by obtaining the approval of the Conservation Com-

*That the Legislature thinks differently in the matter appears from legislative construction with reference to another reappropriation referred to in our brief, page 56,—not commented upon by the appellees.

missioner under section 662 of the Conservation Law (see appendix to main brief, at p. 27) "discarded the allocation of $600,000 it had obtained on September 29" (appellees' brief, p. 65).

There is nothing in the provisions of section 662 itself, or in the allocation requirement of section 8 of the 1926 Appropriation Act (see appendix to main brief, at p. 51), that would suggest such a result. On the contrary, by obtaining the approval of the Conservation Commissioner under section 662, the Palisades Commission complied with the last formality necessary in order to make the general public funds of the State available for the payment of all or any part of the Court of Claims judgment (main brief, pp. 7, 10, 11).

V.

Replying to Point V of appellees' brief (pp. 68-74).

Virtually all of appellees' contentions with respect to the sufficiency of the allegations of its bill to present its supposed federal question, have appeared on earlier pages of its brief and been already answered.

Counsel state (appellees' brief, p. 71) that

> "Exhibit F to the bill shows that the only personal property not a part of the plant and therefore of the realty are an automobile truck and office furniture and fixtures."

But the exhibit itself by no means shows that this was the fact. It is impossible to gather from it (R., 33) how much of the machinery was detachable and removable and how much was permanently affixed to the realty.

Appellees criticize (p. 72) our statement—made upon the authority of Chief Judge Cullen in *County of Albany* vs. *Hooker* (204 N. Y., 1, 19)—that only the Attorney General can challenge the constitutional sufficiency of a statute of appropriation. Their criticism is mistaken.

Chief Judge Cullen in the *County of Albany* case ruled that even an appropriation statute which he expressly assumed to be clearly invalid could be assailed only by an action in the name of the People of the State. And only the Attorney General can bring such an action (*Executive Law,* Section 62, subd. 1; *People* vs. *McClellan,* 118 App. Div., 177, affirmed on opinion of Ingraham, J., in Appellate Division, 188 N. Y., 618).

VI.

Replying to Point VI of appellees' brief (pp. 74-86).

At the bottom of page 75 the argument seems to be that section 662 of the Conservation Law "expressly excluded" the possibility of obtaining the Conservation Commissioner's approval when any bond issue money was to be used in payment for the particular property. The section contains no such prohibition, nor anything else to warrant the conclusion. It makes the approval of the Conservation Commissioner one of the steps to be taken where funds other than bond moneys are to be used in payment, but it nowhere provides that that approval cannot properly be obtained for an appropriation which is to be paid in part out of moneys derived from the bond issue (see main brief, pp. 10-11 and appendix, p. 27).

The assumption underlying the arguments with respect to section 662 seems, however, to be that by complying with the formalities necessary for the use of $600,000 of the bond issue money and also with the formalities necessary in order to make the general funds of the State available, there was something inherently illegal or at least tricky and deceptive (appellees' brief, pp. 75-76). The suggestion is a preposterous one, based altogether upon the plainly mistaken idea that the allocated bond issue money could be used only to pay for land taken by condemnation proceedings. This, as we have shown (main brief, pp. 49-54) is a proposition for which no support can be found in the decided cases or upon principle.

At pages 77, et seq., appellees seek to meet appellants' contention that the action is, in reality, one in ejectment (main brief, pp. 68, 69).

They assert mistakenly that the discussion is foreclosed because of the withdrawal of assignment of error No. 4. They overlook assignment No. 5 (Record, p. 99): "The Court erred in holding that this action is not essentially an action for ejectment."

Appellees do not attempt to answer the controlling decisions of this Court analyzed at pages 66-9 of our main brief, but resort to other cases which, however, have no bearing:

Litchfield vs. *Bond* (see *supra*, pp. 21-22) involved an ordinary injunction against continuing trespasses,—no claim of title.

Flood vs. *Van Wormser*, 147 N. Y., 284, dealt wholly with the ordinary preventive injunction against a threatened injury.

Baron vs. *Korn*, 127 N. Y., 224, was again an injunction suit to restrain continuing trespasses. The opinion in *West Point Iron Co.* vs. *Raymert*, 45 N. Y., 703, does not indicate whether the owners had or had not been dispossessed. In each of these cases the court held (*Baron* case, p. 229; *West Point Iron* case, p. 705) that the right to a jury trial was not claimed in time.*

Bloomquist vs. *Farson*, 222 N. Y., 375, is cited (appellees' brief, pp. 79-80) for the contention that the adequacy of the legal remedy must be raised by answer. But that case held (see especially opinion of the lower court, 170 App. Div., 64, 65) that it was too late to raise

*In the New York courts as in the Federal courts, if defendants claim title they are entitled to have that issue tried by a jury (*City of Syracuse* vs. *Hogan*, 234 N. Y., 457; *Pouchogue Land Corporation* vs. *Long Island State Park Commission*, 125 Misc., 809).

the defense by motion to dismiss at the end of the plaintiff's case where it had not been pleaded. The question here was raised by a motion to dismiss,—*at the very first opportunity* (R., 79-81, 86).

The Federal cases cited by appellees do not help them:

In *Pokegama Sugar Co.* vs. *Klamath River Co.*, the court explained (96 Fed., 34, at p. 56) that the action of ejectment was not adequate there because in that case "complainant asserted certain equities to defeat respondent's right of possession * * *. But in an action of ejectment in the United States Court, where the legal title prevails, such equities could not be considered."

Slaughter vs. *Mallet Land Co.*, 141 Fed., 282, was an action to restrain a trespass by force "resulting, at best, in a disputed joint occupancy" (p. 288).

Percy Summer Club vs. *Astle*, 145 Fed., 53, was an unsuccessful action to restrain a trespass against an alleged exclusive right of fishing.

Love vs. *Atchison, T. & S. Ry. Co.*, 185 Fed., 321, was an action to enjoin a confiscatory rate.

VII.

Replying to Point VII of appellees' brief (pp. 86-88).

Appellees profess to believe "that no funds had been appropriated for a taking in the manner chosen by the Commission" (p. 87).

This is wrong: the uncontradicted evidence is that quite outside the bond moneys—outside the pledges of the state's whole funds—the Commission "on October 11, 1928 (when the said property was appropriated), had on hand" "moneys, securities and other property which could be lawfully used for the acquisition of lands for park purposes in any manner" "of a value in excess of $500,000" (R., 79).

And this fact would by itself and if every preliminary question of New York law were decided in appellees' favor—if the Commission had been subjected to a statutory limitation to funds on hand as they were not; if the use of the bond moneys for entry and appropriation had been prohibited, as in fact it was permitted; if the reappropriation of the bond moneys had been void as in fact it was valid,—this fact, would by itself be decisive against appellees' case under the law of the state whose enactments are in question. For under that law even with respect to a commission under a statutory duty to have funds on hand the test is simply one of "good faith" (*Pauchogue Land Corporation* vs. *Long Island State Park Commission*, 243 N. Y., 15, 27; main brief, p. 35). In the absence of a showing of bad faith an entry and appropriation must stand. "Infallibity" will not be demanded "of the public officials in estimating the true value of property taken by them for state purposes" (*ibid*). And it is settled that in the absence of a showing of bad faith the landowner may not have an interlocutory injunction (*Flagg* vs. *Long Island State Park Commission*, N. Y. L. J., August 3, 1926; *Rasweiler* vs. *Long*

Island State Park Commission, N. Y. L. J., April 29, 1927),—precisely as in the absence of such a showing he must be denied final relief (*Pauchogue Land Corporation* vs. *Long Island State Park Commission*, 248 N. Y., 635; *Flagg* vs. *Moses*, 132 Misc., 494, 225 App. Div., 887, leave to appeal denied by the Court of Appeals, April 23, 1929; *Rasweiler* vs. *Long Island State Park Commission*, N. Y. L. J., July 9, 1927).

In the case at bar there is not a syllable of reflection upon the good faith of the Commission's belief that the real property they appropriated (R., 72)—real property assessed at $15,000 (R., 60)—was worth no more than the moneys on hand.

CONCLUSION.

Replying to pages 88-90 of appellees' brief.

Appellees recur in conclusion (p. 88 of their brief) to the fallacy that section 50 of the Conservation Law has something to do with the entry and appropriation power of the Palisades Interstate Park Commission, although neither section 761 which gives that power, nor section 59 which prescribes the procedure, makes any reference to section 50.

At page 89 reappears the suggestion that what should be required of the Palisades Interstate Park Commission here is the "deposit" of "the value put upon the property by the owner," although the provision for such a deposit formerly contained in section 24 of the Condemnation Law was done away with in 1923 (see pp. 22-23, *supra*).

Appellees challenge our concluding statement (main brief, p. 82) that the entry and appropriation procedure, of which Section 59 of the New York Conservation Law is but a typical modern illustration, had its origin in New York in the Erie Canal Act of 1817. They triumphantly point to the fact that under that Act the fee of land taken did not vest in the State until compensation had been paid and to a statement to this effect by Chancellor Kent in *Rogers* vs. *Bradshaw* (20 Johns., at 741).

The attempted distinction, however, is not a real one and will not bear analysis. For the distinctive and valuable features of entry and appropriation are (1) from the State's point of view, the right to take possession in advance of the payment of compensation, and (2) from the owner's point of view, the fact that the right

to compensation becomes vested upon service of the notice of appropriation, and the State cannot thereafter change its mind and withdraw.

(1) The practical advantage to the State is, of course, the right to take and use the property for the intended public purpose without the delay incident to the determination and payment of compensation. And it was not because the Erie Canal Act of 1817 was thought to vest title in the State immediately upon the entry of the canal officials but because it gave to the canal officials the right of immediate entry,—in advance of payment of compensation—that it has always been referred to as the pioneer statute.* We quote for a second time Judge Vann's statement in *People* vs. *Adirondack Railway Co.* (160 N. Y., at 241) where, referring to the 1817 and subsequent canal acts, he says:

> "All the canals of the state were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the

*So too *Cherokee Nation* vs. *Southern Kansas Ry.*, 135 U. S., 641 (where the condemnation statute permitted entry before payment, but reserved title in the owner until compensation was paid) is cited as the pioneer decision in cases like *Sweet* vs. *Rechel* (159 U. S., at 402), *Backus* vs. *Fort Street Union Depot Co.* (169 U. S., at 588), *Williams* vs. *Parker* (188 U. S., at 502-3), *Crozier* vs. *Krupp* (224 U. S., at 306) discussed in Point I of our main brief (pp. 19-30).

> condemnation, except that the damages when ascertained were paid by the state. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they received the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation."

And from this review of the Canal Acts Judge Vann proceeded directly to the conclusion that the Adirondack Park Act (in which—as in its successor the Conservation Law—it was provided that title should pass to the State when notice of entry and appropriation was served) was

> "not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock* vs. *Young*, 4 Wend., 647; *Jerome* vs. *Ross*, 7 Johns. Ch., 315; *Rogers* vs. *Bradshaw*, 20 Johns., 735.)"*

(2) For the owner the advantage is no less clear, under the entry and appropriation practice, and that whether title vests immediately upon the entry and ap-

*Counsel for the *Adirondack Railway*, appealing to this court from Judge Vann's decision, commented at the end of his brief upon the reference we have quoted to the "adjudications made many years ago and acquiesced in ever since" which "sustained, some directly and others indirectly, the constitutionality" of the appropriation statutes. He conceded that the "reported" decisions of the New York Courts to which Judge Vann thus referred were over two hundred in number. This concession by counsel contesting the New York rule has peculiar significance in connection with the decision by the Court below that the Conservation Law was actually void under the *New York* due process and just compensation clauses.

propriation or only upon the payment of compensation. For in either event, "the appropriation is deemed complete from the time of the service of the notice which is made conclusive evidence of the taking and is binding on all concerned. When the lands are appropriated, the owners are entitled to have their damages assessed and paid in money" (*Kahlen* vs. *State of New York,* 223 N. Y., at 388).

The *Kahlen* case perfectly shows this advantage to the landowner; for the statute there involved did not in terms declare when title was to pass to the State. And this omission Judge Pound, in holding that the State could not recede from its position once the notice of entry and appropriation had been served, declared to be wholly immaterial. He said (at p. 389):

> "The act contains no clause expressly declaring at what state of the proceedings the owner's title is divested, and it has been held in this state, that under the provisions of chapter 262, Laws of 1817, 'the first efficient statute under which our great system of internal improvements was commenced' (15 Barb., 627, 642), the fee did not vest in the state until the payment of the compensation. (*Rexford* vs. *Knight,* 11 N. Y., 308, 314.) The reason for so holding was that the statute so provided—not that the state was thus constitutionally restricted. The case held also that the *appropriation* was complete and constitutional although evidenced only by actual occupation of the lands for canal purposes without prior payment of compensation."

The great proposition established by the *Kahlen* case is that once the state enters—even if the passage of title is deferred as under some of the earlier statutes it was—"the right to compensation became vested. The elementary requirements in favor of property rights in-

flexibly forbid the state to change its sovereign mind" (223 N. Y., 391).

"The legislature"—as Judge Pound put the matter in this fundamental New York opinion which cites *Crozier* vs. *Krupp*, and which Judge Pound himself cited when in the first *Pauchogue* opinion he came once more to write of the constitutional question—

> "is powerless to say that after the taking is complete, there can be no recovery" (223 N. Y., at 390).

No injunction in a case of this sort "ought to be granted unless in a case reasonably free from doubt" (*Ex parte Young*, 209 U. S., 123, 166; *Cavanaugh* vs. *Looney*, 248 U. S., 453, 456-457). The principle, clear in any case, is clearest in a case where the preliminary questions of state law are questions which concern the "sovereign power of eminent domain" (*People ex rel. Horton* vs. *Prendergast*, 248 N. Y., 215, 224, appeal dismissed for want of substantial federal question, 278 U. S., 579). For questions relating to that power have from the beginning been decided by the New York Courts in favor of that power (*Lyon* vs. *Jerome*, 15 Wend., 569, 574,—an early decision by Nelson, C. J., shaping the law of appropriation; *People* vs. *Adirondack Railway*, *supra*).

But there is no doubt. The basic issue in the case is an issue that in the words of this Court is "settled" (*Bragg* vs. *Weaver*, 251 U. S., at 62), "long settled" (*Joslin Co.* vs. *Providence*, 262 U. S., at 677), an issue that Chief Judge Cardozo has in so many words declared to be no longer in the jurisdictional sense a "substantial" issue. Because that issue is settled, appellees' minor contentions become as irrelevant as they are baseless.

The Court will not have overlooked the unreality of appellees' entire case. Appellees have no right—least of all under the Federal Constitution—that their property shall not be taken by the State for a public purpose. Their only right is that if that property is taken, they shall receive its value. There is not the least doubt in anyone's mind that just this will happen. There is no doubt in the minds of appellees. For the very point of their law suit is that the State officials are accepting the appropriation of the property as valid. The conclusion is inevitable that the landowners will be awarded and paid just compensation,—and that is their only right. Every one so situated has had his compensation in the past. Every one will have it in the future. Appellees cannot fail to have it. But what appellees want is not any further assurance of compensation,—any better assurance than an express pledge of the general credit of the State of New York. What they want and by this lawsuit seek, is somehow to prevent the State from going ahead with the established procedure by which land is taken and compensation given.

The interlocutory decree should be reversed, and the bill dismissed.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants, J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park.

JAMES GIBSON,
Second Assistant Attorney General of New York,
Counsel for Appellants, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York.

WALTER H. POLLAK,
CARL S. STERN,
RUTH I. WILSON,
On the Brief.

OCT 2 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 336

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MacDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ANSWER TO MOTION TO ADVANCE.

HENRY J. HEMMENS,
Solicitor for Appellee,
SPARKILL REALTY CORPORATION,
43 Cedar Street,
New York City, N. Y.

CULLEN & DYKMAN,
Solicitors for Appellee,
STANDARD TRAP ROCK CORPORATION,
177 Montague Street,
Brooklyn, N. Y.

WILLIAM N. DYKMAN
JACKSON A. DYKMAN
Of Counsel.

PRESS OF BYRD RICHARDSON DARBY & ROSE, INC., 119 CEDAR ST., NEW YORK

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1929.

No. 336.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

Sparkill Realty Corporation and Standard Trap Rock Corporation,

Appellees.

Come now Sparkill Realty Corporation and Standard Trap Rock Corporation appellees herein and join in the motion of appellants to advance.

By so joining in the motion appellees admit none of the allegations of the petition save as stated in the affidavit of W. Butler Duncan, hereto attached and made a part hereof.

WHEREFORE, appellees respectfully pray this honorable Court the motion to advance this case be granted and the appeal advanced to such early date as may to the Court seem advisable.

HENRY J. HEMMENS,
Solicitor for Appellee,
Sparkill Realty Corporation,
43 Cedar Street,
New York, N. Y.

CULLEN & DYKMAN,
Solicitors for Appellee,
Standard Trap Rock Corporation,
177 Montague Street,
Brooklyn, N. Y.

WILLIAM N. DYKMAN,
JACKSON A. DYKMAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 3[illegible].

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

W. BUTLER DUNCAN, being sworn, says: I am and at all times since its incorporation have been president of appellee, Standard Trap Rock Corporation. I have read

the petition of appellants upon this motion and respectfully state to this honorable Court:

This suit was brought to restrain appellants from enforcing the provisions of an act of the legislature providing for the taking of property for the Palisades Interstate Park by entry and appropriation. In the absence of funds to pay an award therefor such a taking is alleged (R., 9, 10) and has been found to be unconstitutional (R., 82).

A court convened pursuant to Section 266 of the judicial code has granted an interlocutory injunction and denied appellants' motion to dismiss the bill (R., 81) and a motion for a stay pending this appeal.

An opinion by Manton, Circuit Judge, in which Goddard and Bryant, District Judges concur, states the facts and conclusions of the court in full (R., 87).

Inasmuch as the record has been printed no further reference thereto will be made than is necessary to a statement of the reasons of appellees for joining in the present motion.

On October 18, 1927 appellees were each notified in writing by the attorney for appellant Board of Commissioners that their counsel had been instructed to take no steps for the condemnation of their property (Exhibits 2 & 3 to affidavit of White (R., 75, 76).

Thereafter and prior to October 11, 1928, the date of the notice mentioned in appellants' petition, appellee Standard Trap Rock Corporation, in reliance on the aforesaid statement (R., 5) had spent and incurred contractual obligations for construction and equipment of its plant nine hundred twenty-two thousand six hundred ninety-nine and 85/100 ($922,699.85) dollars (R., 6, 32, 43).

Said appellee has issued stock in the sum of about seven hundred fifty thousand ($750,000) dollars and has been able to earn no return or pay any dividends (R., 44).

The fair market value of the property has been estimated by a competent engineer to be four million ($4,000,000) dollars (R., 47).

The only statement as to value made on behalf of appellants is in the affidavit of J. Du Pratt White:

> "I have been advised by our counsel and believe that the value of the property is, as such, not an issue in this litigation,—that the value is to be fixed in the only court in which the State has consented to have a binding adjudication against it—the Court of Claims. In the circumstances, the Commission—though it denies plaintiffs' estimates of value and in the Court of Claims will challenge the figures now presented on behalf of the plaintiffs—will confine itself to stating the conclusion it reached at the time it appropriated.
>
> "All of the members of the Commission were familiar with the property and had visited it at one time or another; many of them had visited it shortly before the appropriation; I have been familiar with the property for forty years and had gone over it on many occasions, some of them just before the appropriation. The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property was worth less than $600,000, and that the obligation of the State would not exceed that sum. The Commission thereupon sought and obtained an allocation from the bond issue moneys of $600,000 (see Exhibit G attached to the plaintiffs' moving papers)." (R., 62).

As stated in the appellants' petition on this motion (pp. 4, 5) Standard Trap Rock Corporation had made extensive preparations for the commencement of its quarrying operations and in October, 1928, was about to begin excavation.

The annual capacity of the plant is seven hundred fifty thousand (750,000) cubic yards for which a market is assured at an annual profit of five hundred thousand ($500,000) dollars (R., 37). This is nowhere denied.

Appellees regained their property in June 1929. To complete and operate the plant a dock is necessary.

The state department of public works, being the only state agency charged with such matters, has approved plans for a dock and issued its permit for the erection thereof.

One of the appellants, Hamilton Ward, as attorney general, is a member ex officio of the so called state land board which I am informed by the solicitors for my company and therefore allege has no jurisdiction over docks or any subject connected with this suit.

Upon application to the War Department for approval of the plans for said dock I am informed said Ward has requested the board of officers charged with such matters to withhold action until the determination of this appeal, thereby in effect seeking a stay of the order from which he appeals although a motion by appellants for such stay was denied by the Court below. No approval by the War Department has been given and until its approval is received appellees are in effect stayed pending the determination of this appeal.

The allegations of paragraph 2 of the grounds stated in the petition for advancement (p. 9), to the effect that no requirement exists in any of the New York statutes providing for the exercise of the right of eminent domain for park purposes that there shall have been appropriated prior to the exercise of such right an amount reasonably certain to cover any award that may reasonably be made, are denied. It is stated by appellants that the doubt cast by the decision in this case upon the constitutional validity of the "customary method" of the Conservation Department and the various park commis-

sions under it must virtually suspend the use of the method until this appeal is determined. The attention of the Court is directed to Section 50 of the Conservation Law of the State of New York, as amended by Chapter 242 of the Laws of 1928, Section 5, being the statute upon which these appellants rely, the opening paragraph of which is as follows:

> "50. Powers and duties of the department relative to lands and forests. The conservation department shall, for the purpose of carrying out the provisions of this article, have the following powers, duties and authority to be exercised through or by the division of lands and forests:
>
> * * * * * *
>
> 2. Have power to establish, acquire, control and manage other state parks and parkways in the forest preserve counties, and in the counties of Albany, Jefferson, Montgomery, Schenectady and Schoharie, and to acquire lands for such purposes *when moneys have been appropriated therefor.*" (Italics supplied.)

Each and every contention of the appellants has been rejected by the Court below upon the motion for an interlocutory injunction in a considered opinion (R., 87).

At least three months will be required to complete the plant rendering it impossible to make contracts for the coming season according to the custom of the trade. Standard Trap Rock Corporation has therefore been subjected to a loss of two years' profits or approximately one million ($1,000,000) dollars (R., 37).

It is vital to appellees that this suit be determined as soon as possible. As stated in the affidavit of White, president of appellant Board of Commissioners, the questions involved are almost wholly questions of law (R., 57). The record has been printed and the case having

been already fully briefed in the Court below may be argued at any time which is convenient to this Honorable Court.

WHEREFORE, deponent prays this honorable Court that this appeal may be advanced to be argued at the earliest possible date consistent with the convenience of the Court.

W. BUTLER DUNCAN.

Sworn to before me this
25th day of September, 1929.
EDITH M. BROWN
Notary Public, Kings County No. 12
Certificate Filed in New York Co. No. [redacted]44
New York Co. Register No. 0-59
Commission Expires March 30, 1930

(Seal)

FILE COPY

DEC 2

CHARLES ELM

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

No. 360. 33

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

JACKSON A. DYKMAN,
Counsel for Appellees.

WILLIAM N. DYKMAN,
on the Brief.

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TABLE OF CONTENTS.

	PAGE
Statement	1
Parties	2
The Commissioners of Palisades Interstate Park	3
Facts	4
Value of Property	8
The Power to Take	11
Outline of Argument	13
ARGUMENT	14
POINTS	
I. No power exists to pledge the credit of New York	14
II. A taking of property in eminent domain is a violation of due process unless there is provided a sure, efficient and convenient remedy by which the owner can coerce payment of just compensation	20
III. No enforceable means of obtaining compensation has been provided	40
IV. Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented	66
V. All facts essential to the presentation of the federal question appear by allegations of the bill of complaint	68
VI. Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals	74
VII. The interlocutory decree grants proper relief	86
Conclusion	88
The interlocutory decree should be in all respects affirmed	90

TABLE OF CASES.

	PAGE
Adirondack Ry. *v.* New York State, 176 U. S. 335..	25
American Bank *v.* Goss, 204 App. Div. 759	52
Attorney General *v.* Old Colony Railroad, 160 Mass. 62, 90	24
Backus *v.* Fort St. Union Depot Co., 169 U. S. 557	24
Banner Milling Co. *v.* State, 240 N. Y. 533.....	68
Baron *v.* Korn, 127 N. Y. 224, 228.....	79
Bix Six Development Co. *v.* Mitchell, 138 Fed. 279	84
Bloomquist *v.* Farson, 222 N. Y. 375.....	79
Board of Excise *v.* Curley, 9 Abb. N. C. 100; 69 N. Y. 608	53
Bohmer *v.* Haffen, 35 App. Div. 381, 386; 161 N. Y. 390, 405	48
Bragg *v.* Weaver, 251 U. S. 57, 62.....	28, 34
Carling *v.* Purcell, 3 Misc. 55, 56.....	51
Cavanaugh *v.* Looney, 248 U. S. 453	87
County of Albany *v.* Hooker, 204 N. Y. 1, 19.....	72
Crozier *v.* Krupp, 224 U. S. 290	28
Flagg *v.* Moses, 132 Misc. 494.....	85
Flood *v.* Van Wormser, 147 N. Y. 284.....	78
Gilchrist *v.* Interborough Co., 279 U. S. 159, 207..	66
Goltra *v.* Weeks, 271 U. S. 536, 545.....	76
Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 581	37
Half Moon Bridge Co. *v.* Canal Board, 91 Misc. 600	43, 58
Harris *v.* White, 81 N. Y. 532.....	53
Hays *v.* Port of Seattle, 251 U. S. 233.....	33
Joslin *v.* Providence, 262 U. S. 668, 677.....28, 34, 68	

PAGE

Kahlen *v.* State of New York, 223 N. Y. 383..... 46

Knapp *v.* The City of Brooklyn, 97 N. Y. 520..... 51

Litchfield *v.* Bond, 186 N. Y. 6[illegible]..... 22, 78
Love *v.* Atchison, T. & S. F. Ry. Co., 185 Fed. 321 83

Matter of Alter'g etc. Main St., Sing Sing, 98 N. Y. 454 51
Matter of Appl'n Mayor, etc. of City of N. Y., 99 N. Y. 569 25
Matter of Bronson, 150 N. Y. 1 47
Matter of William and Anthony Streets, 19 Wend. 678 68
Merritt & Chapman Co. *v.* U. S., 274 U. S. 611.... 68
Minnesota *v.* Hitchcock, 185 U. S. 373..... 30
Mitchell *v.* United States, 267 U. S. 341 69
Mt. Vernon Cotton Co. *v.* Alabama Power Co., 240 U. S. 30, 33 28
Mundy *v.* Excise Commissioners of New York, 9 Abb. N. C. 117 54

Newell *v.* The People, 7 N. Y. 9, 106..... 16
New Orleans *v.* Benjamin, 153 U. S. 411, 430..... 66
N. Y. C. R. R. Co. *v.* Maloney, 234 N. Y. 208 69

Op. Atty. Gen. (1916) 123 43
Orleans County Quarry Co. *v.* State, 172 App. Div. 863 69
Osborn *v.* U. S. Bank, 9 Wheat. 738 .....67, 80, 86

Pauchogue Land Corporation *vs.* Long Island State Park Commission, 243 N. Y. 15..... 19

Pauchogue Land Corporation *vs.* Long Island State Park Commission, 248 N. Y. 635; c. d. 278 U. S. 657 ..... 34, 85

PAGE

People ex rel. Garvey *v.* Prendergast, 148 App. Div. 129 53
People ex rel. Hopkins *v.* B'd Suprs. Kings Co., 52 N. Y. 556.....18, 55, 64
People *v.* Johnson Co., 219 App. Div. 285; 245 N. Y. 627; 275 U. S. 571 71
People of New York *v.* Canal Board of N. Y., 55 N. Y. 390 ..... 18, 76
Percy Summer Club *v.* Astle, 145 Fed. 53; 163 Fed. 1 ..... 83, 84
Philadelphia Co. *v.* Stimson, 223 U. S. 605..... 76
Pokegama *v.* Klamuth, 86 Fed. 528; 96 Fed. 34.... 81
Railroad *v.* Mississippi, 102 U. S. 96..... 67
Rockaway Pacific Corp. *v.* Stotesbury, 255 Fed. 345 ..... 38, 39
Rogers *v.* Bradshaw, 20 Johns 735 90
Sage *v.* The City of Brooklyn, 89 N. Y. 189..... 20
Shoemaker *v.* United States, 147 U. S. 282..... 38
Slaughter *v.* Mallet Land & Cattle Co., 141 Fed. 282, 288 82
Smith *v.* Reeves, 178 U. S. 436, 444 78
Sweet *v.* Rechel, 159 U. S. 380..... 23
Twist *v.* Prairie Oil Co., 274 U. S. 684, 691..... 84
United States Freehold Land and Emigration Co. *v.* Gallegas, 89 Fed. 769, 773..... 84
Western Un. Tel. Co. *v.* Andrews, 216 U. S. 165.. 84
West Point Iron Co. *v.* Reymert, 45 N. Y. 703.... 79
Williams *v.* Parker, 188 U. S. 491 26

Books

Lewis, Eminent [illegible] (2d ed.) 1253 ..... 8, 68
Pomeroy, Equity [illegible] § 98 82
High, Injunctions, § 806 82

Constitutions and Statutes

PAGE

Condemnation Law
Section 17 24
Section 24 ..... 24, 89

Conservation Law
Section 9 3
Section 50 88
Section 59 ..... 42, 45, 64, 65, 75
Section 662 ..... 64, 65, 75
Section 759 ..... 24, 45
Section 761 45

Constitution of New York
Section 16, Article III 48
Section 21, Article III 14, 19, 39, 44, 54, 55, 61, 62
Section 2, Article V 3, 4
Section 4, Article VII 14, 43, 56, 58, 59, 64
Section 21, Article VII 17

Executive Law
Section 68 3

General Construction Law
Section 80 ..... 46, 47

Judicial Code
Section 266 87

Laws of 1817, Chapter 262 89
Laws of 1851, Chapter 485 16
Laws of 1857, Chapter 628 53
Laws of 1859, Chapter 439 61
Laws of 1868, Chapter 631 20
Laws of 1872, Chapter 700 ..... 18, 55
Laws of 1872, Chapter 740 18

PAGE

Laws of 1874, Chapter 327..... 33
Laws of 1875, Chapter 431..... 51
Laws of 1880, Chapter 568..... 51
Laws of 1892, Chapter 340..... 48
Laws of 1897, Chapter 220..... 25
Laws of 1900, Chapter 170
3, 4, 11, 12, 24, 45, 46, 51, 53, 60, 61
Laws of 1902, Chapter 473..... 22
Laws of 1909, Chapter 27..... 47
Laws of 1913, Chapter 801..... 58
Laws of 1924, Chapter 112..... 35
Laws of 1924, Chapter 602
42, 44, 45, 46, 47, 51, 53, 57, 58, 60, 61, 63, 64
Laws of 1926, Chapter 16
12, 13, 43, 44, 46, 47, 51, 53, 54, 55, 57, 61, 62, 63, 71, 74, 76
Laws of 1928, Chapter 75.....44, 54, 57, 61, 62, 63, 88
Laws of 1928, Chapter 242
3, 4, 5, 12, 45, 46, 49, 50, 53, 63, 72

Revised Statutes of N. Y.
Art. IV, Title I, Chapter 16, Part I..... 51

Sess. Laws 1913, p. 195..... 33

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York, Appellants, *against* SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION, Appellees.	No. 366.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES.

Statement.

This is a suit to restrain appellants, Commissioners of the Palisades Interstate Park, from appropriation of

plaintiff-appellees' trap rock quarry and crushing plant at Piermont, New York (R., 10).

The question presented is whether state officers may appropriate real property for park purposes by notice under a statute which provides and is accompanied by no means of compensation to the owner because, in the absence of funds appropriated for the purpose, the state constitution forbids payment of any judgment out of any funds in the state treasury.

The Conservation Law of New York has not been held void.

No statute of New York pledges or authorizes a pledge of the entire or any portion of the credit of the state to pay for property taken in eminent domain.

There being no means by which appellees can enforce payment of compensation the District Court has enjoined appropriation of the land by appellant Commissioners.

Parties.

Plaintiff, Sparkill Realty Corporation, owns the real property in question at Piermont, New York, on the western bank of the Hudson River, containing an extensive deposit of trap rock easily available for quarry purposes, (Complaint, par. Seventh, R., 4; Shaw, R., 36; Soper, R., 47; Gucker, R., 48; Lane, R., 50).

Plaintiff, Standard Trap Rock Corporation, leased this property in 1927 for twenty years with a privilege of renewal for a like term at a minimum rental of $35,000 per year. The lease was made for quarry purposes. Plaintiff lessee has constructed a stone-crushing plant on the property and stripped a portion of the quarry at a cost of more than one million ($1,000,000) dollars, Com-

plaint, pars. Eighth, Twelfth, Thirteenth (R., 4, 5, 6); Shaw (R., 40, 43, 44).

Defendant, Board of Commissioners of the Palisades Interstate Park, is "a body politic, with power to sue and be sued, to use a common seal, and to make and adopt by-laws to regulate its proceedings" by virtue of section 41, chapter 242 of the laws of 1928, of the state of New York, being Part 9, Article XVI, §746 of the Conservation Law[1] of the state.

The Attorney General is made a party by reason of section 68 of the Executive Law of the state authorizing his appearance in cases involving the constitutionality of any act of the legislature (R., 87).

The Conservation Commissioner is made a party by reason of section 9 of the Conservation Law authorizing him to defend certain actions (R., 87).

The Commissioners of Palisades Interstate Park.

Chapter 170 of the laws of 1900 created a Board of Commissioners of the Palisades Interstate Park[2].

The commission was given power to acquire land *by condemnation* according to procedure carefully prescribed in the act which provided among other things that the commissioners *shall not acquire title or enter into possession of any land until the amount awarded* in a proceeding in the Supreme Court in the Ninth Judicial District *shall have been paid* (Sec. 16)[3].

Article V of the state constitution was amended at the general election of November 3, 1925 by the creation

[1]Appellants' Appendix, p. 28, (R., 87).
[2]Idem, p. 7.
[3]Idem, p. 19.

of twenty departments in the state government (Art. V, §2) and the legislature directed to provide for the appropriate assignment of all the civil, administrative and executive functions of the state government to the several departments (Art. V, §3).

Chapter 242, §41, of the laws of 1928[1] added a new article, numbered XVI and entitled Division of Parks to the Conservation Law.

Section 50 of Chapter 242 of the laws of 1928[2] repealed chapter 170 of the laws of 1900, as amended,[3] and in substance re-enacted sections 1 to 17, inclusive, of the repealed statute as section 745 to 760,[4] inclusive, of the new. These deal with acquisition of lands *by condemnation* in the Supreme Court.

Defendant, Board of Commissioners, has assumed to take the property *by appropriation* under Section 761[5] of the new Conservation Law, Chapter 242 of the Laws of 1928 of the State of New York.

Facts.

The title of Sparkill Realty Corporation to the real property on October 11, 1928, the date of appropriation, and that it had in 1927 leased it to Standard Trap Rock Corporation for quarrying purposes for twenty years with a renewal of twenty more is conceded (Appellants' Brief, p. 6).

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[1]Appellants' Appendix, p. 27.
[2]Idem, p. 35.
[3]Amended and supplemented by L. 1901, ch. 504; L. 1906, ch. 691; L. 1910, ch. 361 and 362; L. 1913, ch. 420; L. 1914, ch. 15; L. 1915 ch. 562; L. 1917, chs. 71, 168, 251; L. 1919, ch. 6; L. 1920, ch. 283; L. 1922, ch. 79; L. 1924, ch. 354.
[4]Appellants' Appendix, pp. 28-34.
[5]Idem, p. 34.

It is likewise conceded that Standard Trap Rock Corporation "had made extensive preparations for its quarry and at the end of September 1928 was about to begin actual excavation" (Appellants' Brief, p. 6).

The nature of these preparations and their making in reliance upon the statement of the Commission that it was not going to condemn the property, made one year before it served notice of appropriation, and the Commission's acquiescence in the expenditure of a million dollars upon the property are nowhere denied in the appellants' affidavits.

The outstanding facts are:

1. April 13, 1927 Sparkill Realty Corporation and Anderson Dana executed a written agreement granting the latter a sixty day option to lease the property (R., 38).

2. May 19, 1927 Sparkill Realty Corporation leased to Standard Trap Rock Corporation for twenty years with privilege of renewal for an equal period (R., 4, 5, 38) (Bill, Exhibit A, R., 11).

3. On the same day and as part of the same transaction the parties executed a supplemental agreement (Bill, Exhibit B, R., 23) providing that if the Commission should start condemnation proceedings prior to April 20, 1928 the minimum annual royalty of $35,000 payable lessor should not become effective unless and until such proceedings should have been finally discontinued or terminated without vesting of title and ten calendar months have elapsed thereafter.

4. On June 11, 1927 counsel for the defendant Commissioners formally notified plaintiffs that a resolution had been adopted by the Commissioners directing pre-

liminary steps be taken toward the acquisition of the property for park purposes consisting of meadow lands and uplands to the top of the cliff (R., 5, 38).

5. Thereafter the attorneys for appellees advised counsel for the Commissioners of the making of the lease, the incurring of considerable expense and substantial commitments, including an undertaking to equip and complete a large plant and advised the Commission that "in this situation if the property is to be condemned, Standard Trap Rock Corporation naturally wishes to avoid further expense in so far as compatible with its obligations under the lease" (R., 39).

6. On July 12, 1927 the Commission was advised of the readiness of appellees to appear before it and at the request of counsel for the Commission blue prints were forwarded it and permission granted it to make borings. Correspondence between the parties ensued, resulting in a request from its counsel for the submission to the Commissioners of an offer of sale and such an offer was made on the part of appellees (R., 39). Mr. White states a value of $3,000,000 was put on the fee and a value of $5,000,000 on the leasehold, making a total of $8,000,000, which appellees were then ready to accept (R., 60).

7. It is conceded in the affidavit of White that on October 18, 1927, Messrs. Hughes, Rounds, Schurman & Dwight advised the attorneys for the respective appellees by letters containing the following statement (R., 75, 76):

> "Your letter of October 14th, together with other data and information furnished us by you

> or Mr. Hemmens, have been submitted to and considered by the Commissioners of Palisades Interstate Park, who have requested us to report to you that at their meeting today it was decided and resolved by them that their counsel be instructed to take no steps for the condemnation of the Tallman Mountain property."

8. On October 19, 1927 the attorneys for appellees, Standard Trap Rock Corporation, wrote the attorneys for the Commissioners acknowledging receipt of their letter of October 18th and stating:

> "Our clients are accordingly proceeding with the plans which they had made for the development of the quarry and which have been in abeyance since the receipt of your letter of May 13, 1927" (R., 5, 40).

On the same day appellees made their second supplemental agreement (R., 25) which, after reciting the provision of the first (R., 23) with reference to possible condemnation, referred to receipt of the letter of October 18, 1927, extended the lease and provided for payment of an instalment of royalty on February 1, 1928 (R., 26).

9. No further communication, written or oral, was received by either of appellees from the Commissioners or any other Department of the State of New York until August 18, 1928, when they were served with a notice of resolution of the Board of Commissioners of the Land Office requiring cessation of dredging at the plant. The allegation is nowhere denied that this action was taken at the request of the appellant Commissioners, who had

been informed of the plan for dredging eleven months prior thereto (R., 40).

10. Meanwhile, and after appellees had been notified appellant Commissioners would take no step toward the condemnation of their property, appellee, Standard Trap Rock Corporation, in addition to affirming its lease had completed a plant, in the building and equipment of which it had expended and incurred contractual obligations amounting to approximately $1,000,000 (R., 5, 6, 40).

11. October 11, 1929 appellees were served with a notice of appropriation as more fully described later.

Value of Property.

The value of the real property and improvements pleaded in the bill and shown by affidavits is not denied.

The bill alleges (par. Nineteenth, R., 8) that "the real property * * * and the leasehold * * * were and now are * * * of the value at present in excess of three million ($3,000,000) dollars."

The form of allegation is proper and sufficient because:

> "When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights."
>
> Lewis, Eminent Domain [3d Ed.], p. 1253.

This is not an attempt to enhance the value by a distribution of the title or estate among the owners of different interests as asserted by appellants in their brief (p. 60). The pleader has followed the rule of entire

compensation stated by Mr. Lewis and alleged value as if there were but one estate in the property. Having previously pleaded the lease (par. Eighth, R., 4) and both parties being plaintiffs the pleader when he came to the allegation of value included all estates in one sum.

The affidavits of Shaw (R., 36, 40, 43, 44), Soper (R., 47), Gucker (R., 48), Lane (R., 50) and Keine (R., 52) prove a value of real property and improvements of $4,000,000.

The only statement on the subject of value presented by appellants is in the affidavit of White (R., 62, 63):

> "I have been advised by our counsel and believe that the value of the property is, as such, not an issue in this litigation,—that the value is to be fixed in the only court in which the State has consented to have a binding adjudication against it—the Court of Claims.[1] In the circumstances, the Commission—though it denies plaintiffs' estimates of value and in the Court of Claims will challenge the figures now presented on behalf of the plaintiffs—will confine itself to stating the conclusion it reached at the time it appropriated.
>
> All of the members of the Commission were familiar with the property and had visited it at one time or another; many of them had visited it shortly before the appropriation; I have been familiar with the property for forty years and had gone over it on many occasions, some of them just before the appropriation. The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property

[1]Appellants have withdrawn Assignment of Error 4 (R., 99):
"The Court erred in not dismissing the bill of complaint on the ground that the suit is in reality against the State of New York and with respect to property in its possession, and that the State has not given its consent to be sued." (Appellants' Brief, p. 17).

> was worth less than $600,000, and that the obligation of the State would not exceed that sum. The Commission thereupon sought and obtained an allocation from the bond issue moneys of $600,000 (see Exhibit G attached to the plaintiffs' moving papers)."[1]

Mr. White concedes the property consists of one hundred thirteen and one-half acres of upland and fifty-seven and one-half acres of marsh land (R., 59), and the statements in the affidavit of Shaw (R., 36) that the property contains more than forty million cubic yards of trap rock of the highest quality and grade, all of which is readily and practically available for quarrying and crushing, that the plant is adequate for and capable of crushing, conveying and storing seven hundred and fifty thousand cubic yards of trap rock annually and that the annual profit will be over $500,000 are nowhere denied, nor is any other proof of value on the part of appellees met, but on the contrary it is conceded in the affidavit of White (R., 58) that other quarries taken by his Commission were earning large profits.

The experience of the Commission in connection with the acquisition of other properties, including quarries, does not qualify its members as experts. It is significant the Court has been given the benefit of none of the advice of the staff and technical experts or the data and reports which are in the possession of the Commission, according to the affidavit of White (R., 63).

Appellees on the contrary have furnished the Court:

1. A detailed statement of cost of plant and fixtures (Bill, Exhibit F, R., 32).

2. The quantity of trap rock readily available for quarrying (R., 36, 53).

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[1]The allocation had in fact been approved several days before the meeting on October 9, 1929 when it was resolved to appropriate the property. (R., 54, 64).

3. The nature and capacity of the plant (R., 36).

4. The cost of operation (R., 37, 49).

5. The market for output (R., 37), all of which is based upon the opinion of the experienced civil and mechanical engineers Shaw (R., 35) and Soper (R., 45), the quarrymen Gucker (R., 47) and Lane (R., 49), the machinery contractor Keine (R., 51) and the surveyor Christie (R., 52).

Opposed to this is the "conclusion" of a party to the suit (R., 63), based on advice, data and reports *in its possession* (R., 63) and not disclosed although confessedly available.

The value of the property is not denied.

The Power to Take.

The commission under the statute which created it (L. 1900, ch. 170, §16)[1] and which has been re-enacted[2] may exercise its power of eminent domain *only by condemnation* and does not acquire title to, or enter into possession of, property taken for park purposes *until the value of the property as fixed by appraisal had been paid to the owner.*

Unless acquisition of lands is completed within eighteen months from the inception of the proceeding the court has discretionary power to discontinue all proceedings (L. 1900, ch. 170, §17)[3] on application of any person interested, a substantial right of the landowner calculated to insure the inseparability of the power to take and indemnity for the taking.

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[1]Appellants' Appendix, p. 19.
[2]Idem, 28-34.
[3]Appellants' Appendix, p. 19, Section 760, Conservation Law, Idem, p. 24.

Chapter 170 of the laws of 1900 was repealed by chapter 242, §50, of the laws of 1928[1] which, however, reenacted its provisions as part of a new Conservation Law and added a new provision in

> "SECTION 761.[2] Acquisition of lands by entry and appropriation. In addition to the various methods of acquiring lands provided for in this part of this article, the commissioners of the Palisades Interstate Park shall have the power to acquire lands by entry and appropriation in the manner provided for in section fifty-nine of the conservation law."

It was pursuant to this section the Commission assumed to act on October 11, 1928 in appropriating appellees property and it is upon this section appellants rely (Appellants' Brief, p. 8).

Their acts show a recognition of the necessity under any power for an antecedent appropriation of moneys sufficient to pay an award.

On September 29, 1928, eleven days before the Commission met to pass its resolution for the taking (R., 71) the approval of the State Council of Parks (R., 54) and the Governor and Legislative Chairmen *acting pursuant to section 4, chapter 16 of the laws of 1926* were obtained and were signed and filed with the State Comptroller one day before the meeting (R., 55).

Appellants concede in their brief (p. 10) that before any obligation for the expenditure of bond moneys appropriated by chapter 16 of the laws of 1926[3] could be incurred a map of the proposed park and an estimate of cost must be approved by the State Council of Parks, the Governor, the Chairman of the Senate Finance Commit-

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[1]Idem, p. 35.
[2]Idem, p. 34.
[3](L. 1926, ch. 16, §4, Appellants' Appendix, p. 48).

tee and the Chairman of the Assembly Ways and Means Committee. By virtue of this approval it is asserted $600,000 became available out of bond moneys for the acquisition of lands in the town of Clarkstown and the property of appellees, which alone is worth $3,000,000.

Outline of Argument.

The decree of the District Court should be in all respects affirmed, because

(1) No power exists to pledge the credit of New York.

(2) A taking of property in eminent domain is a violation of due process unless there is provided a sure, sufficient and convenient remedy by which the owner can coerce payment of just compensation.

(3) No enforceable means of obtaining compensation has been provided.

(4) Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented.

(5) All facts essential to the presentation of the federal question appear by the allegations of the bill of complaint.

(6) Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals.

(7) The interlocutory decree is proper and grants proper relief.

ARGUMENT.

POINT I.

No power exists to pledge the credit of the state.

Provisions of the state constitution occupy in this suit the position of facts in the chain of causation which brings the Fourteenth Amendment into operation.

Each has been construed by the highest court of the state so that no question of state law is presented upon which the state courts would have to rule before any impediment to appellees' full compensation and consequently any due process question * * * could arise (Appellants' Brief, p. 49).

The settled law of the state compels an application of the Fourteenth Amendment.

Section 21, Article III, Constitution of New York provides:

> §21. Appropriation bills.
> No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

Section 4, Article VII,[1] Constitution of New York provides:

> Except the debts specified in sections two and three of this article,[2] no debts shall be hereafter contracted by or in behalf of this State, unless

[1] Not printed in full by appellants, Appendix, p. 5.
[2] Admittedly inapplicable.

such debts shall be authorized by law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the Legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The Legislature may at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law;[1] but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on within three months after its passage or at any general election when any other law, or any bill shall be submitted to be voted for or against. The Legislature may provide for the issue of bonds of the State to run for a period not exceeding fifty years in lieu of bonds heretofore authorized but not issued and shall im-

[1]No power of amendment of a referendum act exists.

pose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund, and the Legislature shall reduce the tax to an amount equal to the accruing interest on such debt. The Legislature may from time to time alter the rate of interest to be paid upon any State debt, which has been or may be authorized pursuant to the provisions of this section, or upon any part of such debt, provided, however, that the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof, which has been, or shall be created or issued before such alteration. In case the Legislature increase the rate of interest upon any such debt, or part thereof, it shall impose and provide for the collection of a direct annual tax to pay and sufficient to pay the increased or altered interest on such debt as it falls due and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof, and shall appropriate annually to the sinking fund moneys in amount sufficient to pay such interest and pay and discharge the principal of such debt when it shall become due and payable.

Newell v. *The People,* 7 N. Y. 9, 106.

In 1851 the legislature passed an act for completion of the Erie Canal (L. 1851, ch. 485). It provided for Canal Revenue Certificates in a form containing the words "without any other obligation, liability or pledge on the part of the state of New York, than such as is contained in said act."

The act provided:

"§14. In case of any failure of revenues from the canals, by reason of pestilence, deficiency of

crops, or breaches, or damages to the canal, or from any other cause, the state shall in no event be liable to make up the deficiency of revenue, or to redeem the canal revenue certificates in any other manner than out of the canal revenues of the state, as directed by the provisions of this bill for that purpose. The certificates to be issued under this act shall in no event or contingency be so construed as to create any debt or liability against the state or the people thereof within the meaning of section twelve, article seven, of the constitution."

The Court of Appeals wrote of this section, now Section 21, Article VII:[1]

"The section of the constitution referred to had already rendered it impossible that the certificates should create any debt or liability against the state or the people, and a legislative provision of this sort was not necessary for the protection of that instrument. Is its effect to preclude us from inquiring whether the certificates, or the provisions of the act taken in connection with the certificates, purport to create a debt or liability against the state or the people thereof? We think not. It does not alter, or profess to alter, any one provision of the act. It leaves them all standing on the statute book, with the apparent force of law, and with the sanction of legislative approval, forming together a single scheme for raising money, on the faith of which capital is invited to assist the state. *Under this state of things, can we be asked to take the ground that the state is to be regarded as coming into the money market, with a cunningly devised plan of promises, seemingly efficacious, but really known to be wholly unlawful and incapable of conferring any legal right, and by such means seeking to procure the advance of money? The respect which we owe to the leg-*

[1]Appellants' Appendix, p .4.

islature forbids us to listen for one moment to the suggestion."[1] (Italics supplied).

People of N. Y. v. *Canal Board of N. Y.*, 55 N. Y. 390.

There a statute (L. 1872, ch. 740) directed an examination by the canal board of expenditure for a specific improvement and authorized the board to allow and the auditor to pay, out of moneys appropriated or to be appropriated, any excess of expense over prices actually paid for the improvement.

The Court of Appeals said of the Canal Board:

> "They are in no sense custodians of the public funds or trustees of the public moneys or credit" (p. 398).[2]

With reference to the constitutional restriction on disbursement of public funds the opinion reaffirmed the rule that:

> "No moneys can be drawn from the treasury except in pursuance of an appropriation by law; and every act making an appropriation must distinctly specify the sum appropriated and the object to which it is to be applied" (p. 399).

Peo. ex rel. Hopkins v. *B'd Suprs., Kings Co.*, 52 N. Y. 556.

There the Court of Appeals held unconstitutional an act of the legislature (L. 1872, ch. 700) authorizing the creation of a debt to meet deficiencies in the canal and general funds. The opinion states:

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[1]This is exactly the kind of promise put forward by appellants and called a pledge of credit.

[2]These Commissioners assert this power is in the Conservation Commissioner.

> "Neither the legislature nor the officers and agents of the state, or all combined, can create a debt or incur an obligation for or in behalf of the state, except to the amount and in the manners provided for in the constitution." (p. 563).

The particular statute was held void:

> "But the whole theory of the act is entirely subversive of the Constitution. It proceeds upon the assumption that a state debt may be created and exist outside the constitution, either by act of the legislature, or the acts of the administrative or executive officers and agents of the state; that, notwithstanding the stringent provisions of the organic law of the state, expenses may be authorized and liabilities incurred in advance and in excess of money provided, which must be met either by direct taxation or by borrowing." (p. 563).

The purpose of the Constitution was found to be to prevent the creation of floating debts.

These appellants assert that the Conservation Commissioner's approval of this taking (R., 73, 74) "brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives". (Appellant's brief, p. 11).

The cases cited establish that neither the legislature nor the officers and agents of the State, or all combined, can pledge its credit.

In *Pauchogue Land Corporation* v. *Long Island State Park Commission,* 243 N. Y., 15, in a dictum on which appellants greatly rely, the Court recognizes that no money can be paid out of the treasury of the state or any funds under its management except in pursuance of an appropriation by law (Section 21, Article III). Commenting upon the danger of the power in that case the Court says:

"If its contention is tenable, the conclusion logically follows that it has a 'charter as wide as the wind withal' and it might seize for park purposes all the land in Suffolk and Nassau Counties and send the claimants to the Court of Claims to establish their damages" (p. 25).

POINT II.

A taking of property in eminent domain is a violation of due process unless there is provided a sure, sufficient and convenient remedy by which the owner can coerce payment of just compensation.

Appellants assert that a pledge of the general credit of the state assures just compensation and satisfies the constitutional requirement of due process (Appellant's Brief, p. 19).

The phrase "pledge of general credit" arose when statutes were first enacted which vested title to land taken in eminent domain prior to actual payment of compensation. It was soon established in New York under its constitution that such a pledge must amount to a lien upon a specific fund antecedently appropriated. The cases cited in Point I, supra, so hold and there are many more.

Sage v. *The City of Brooklyn*, 89 N. Y. 189.

There the Legislature of New York, by Chapter 631 of the Laws of 1868, widened Sackett Street in the City of Brooklyn, appointing commissioners to assess the expense upon property within a specified area of assessment. The total awards amounted to $334,000 while the amount paid in to the treasury by special assessment was only $280,000.[1] The action was brought by unpaid

[1]Just as here $600,000 is said to be available for property worth $3,000,000.

owners of lands taken in the proceeding to recover their awards as a debt. Liability was denied by the defendants upon the ground that the widening was a State and not a municipal improvement.

Chief Judge ANDREWS wrote:

> "If no immediate or ultimate duty is imposed on the city to pay the awards, or make good any deficiency in the assessment fund, then we repeat the plaintiffs are without remedy to recover their award. The position of the city, if sustained, leads to the inevitable conclusion that the lands of the plaintiffs were never lawfully taken for the improvement, that their title has never been divested, and that they may now enter upon and reclaim the exclusive possession of the lands of which they have been deprived."

So, in the present case, there being no tribunal in which these plaintiffs may recover an award, their title has never been divested.

Continuing upon the subject of a pledge of the public credit, the learned Chief Judge wrote:

> "The courts in construing the constitutional guaranty have departed from what may seem its plain and natural meaning, and have held that the payment for property taken in invitum for public use, need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking, also provides a sure, sufficient and convenient remedy by which the owner can subsequently *coerce payment by legal proceedings.* If such provision is not made, then, as was said by Nelson, Ch. J. 'the law making the appropriation is no better than blank paper.' (People ex rel. Utley *v.* Hayden, 6 Hill, 359). It is, I think, a plain proposition, that a law authorizing the taking of a man's land, and remitting him for his sole remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate pro-

> vision, depending upon no 'hazard, casualty or contingency whatever,' such as law and justice require to meet the constitutional requirement. The pledge of the faith and credit of the State, or of one of its political divisions, for the payment of the property owner, *accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment,* has been held to be a certain and sufficient remedy within the law. But a remedy for compensation, contingent upon the realization of a fund from taxation for benefits within a limited assessment district, does not meet the constitutional requirement. The inadequacy of such a provision finds in the circumstances of this case ample illustration. (See Chapman *v.* Gates, 54 N. Y. 146.)" (Italics supplied).

In other words, the Constitution creates an obligation on the part of the legislature to furnish a means of payment and, while a taking before payment is "a departure from what may seem its plain and natural meaning", a pledge of the faith and credit of the State justifies a taking before actual payment, but the pledge must be enforceable against an existing fund. A taking before payment is justified only where an accompanying appropriation is subjected to a lien by the guaranty of the public faith and credit that the money appropriated will not be used for any other purpose and will remain, pending the determination of value, subject ultimately to execution for payment.

Litchfield v. *Bond,* 186 N. Y. 66.

There the state engineer had entered upon plaintiffs' land under an act of the legislature providing for the laying out of county lines and had cut a slash through woodlands.

The Court of Appeals says of the statute (L., 1902, ch. 473):

"Such a statute, if intended to authorize the exercise of the right of eminent domain, would be clearly unconstitutional, because it makes no provision for compensation to those whose private property is taken for a public use. While payment need not precede the taking, *the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover*" (p. 74).

"If the occupation is to be permanent or the damage is to be substantial then the state and those assuming to act under it must invoke those powers under which such things may lawfully be done" (p. 79).

"* * * it is fundamental that, although payment need not precede the taking, *the provision for compensation* is an indispensable precedent" (p. 81). (Italics supplied).

Decisions of this Court cited by appellants establish the same construction of the Fourteenth Amendment here.

Sweet v. *Rechel*, 159 U. S. 380, 402.

A Massachusetts statute of eminent domain provided for execution against the City of Boston or the Boston Water Power Company and the question before the Court was whether the constitution required compensation be *paid* the owner *before* title vests. No such contention is made by these appellees. On the contrary they rely upon the proposition here laid down and subsequently followed:

"It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner and gives

him an unqualified right to a judgment for the amount of such damages *which can be enforced,* that is, *collected* by judicial process" (Italics supplied).

It is worth noting that execution against a private corporation was given by the statute and that under the decisions of the Supreme Judicial Court[1] if the landowner took proper measures to have his compensation determined and it was not ultimately paid a court of equity would enjoin the further use of it and the owner could retake the land.

Backus v. *Fort Street Union Depot Co.,* 169 U. S. 557.

There the act under which the property was taken, § 3468—Sec. 11, provided the company should be entitled to enter upon and take possession of and use the land and other property on payment or deposit of the sum fixed by commissioners or a jury to be paid as compensation for such land and other property and for costs, expenses and counsel fees. *Such a privilege is still open to this Commission under the provisions of Section 759 of the Conservation Law*[2] *which reenacted those of Section 16 of Chapter 170 of the Laws of 1900.*[3]

It is moreover significant that under the general Condemnation Law of New York,[4] which contains a similar

[1]Attorney General v. Old Colony Railroad, 160 Mass. 62, 90.
[2]Appellants' Appendix, p. 33.
[3]Idem, p. 19.
[4]L. 1920, ch. 923.

provision postponing delivery of possession until payment (Section 17), it is provided in Section 24[1] that the condemnor may

> "be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property * * * ."

Adirondack Ry. v. *New York State,* 176 U. S. 335.

It was conceded upon the argument below that the Adirondack Park Act (L. 1897, Ch. 220), called by appellants the parent statute whose place the Conservation Law now takes, contained an appropriation of $600,000 for the purposes specified in the act. The portion of the opinion of this Court quoted by appellants in their brief (p. 24) citing Sweet *v.* Rechel, supra, and thus establishing its effect, requires "a certain, definite and adequate source of payment" and in finding "the state treasury is the source of payment" it is perfectly evident Mr. Justice Brewer was referring to the amount appropriated by the Act itself.

Matter Appl'n Mayor, etc., of City of N. Y., 99 N. Y. 569, 577.

There the Court of Appeals wrote:

> "It is further objected to the act, that it makes no provision for just compensation to those whose lands are taken, and so violates section 6 of article 1 of the Constitution. While it is not necessary,

[1] L. 1923, ch. 246.

> in advance of the taking, to pay to the landowner his compensation, it is necessary that the act which invades his ownership shall provide for a certain and definite and adequate source and manner of payment. (*Sage* v. *City of Brooklyn,* 89 N. Y. 189). *This necessity is vital and of the most essential character, since if unheeded or disregarded, it transforms the right of eminent domain into a legalized plunder of the citizen.* But this act does not so offend. It puts the public purse of the city behind the debt as the source of its payment. By section 4 the municipality is required within four calendar months after the confirmation of the report of the commissioners, to pay the compensation awarded to the parties interested, and if payment be not so made, those to whom it is due may, after demand, maintain an action against the city. Nothing in this record shows that the municipality has already reached the limits of its capacity to contract debt, or cannot legally incur the new liability. There is no ambiguity or uncertainty about this provision, and the citizen is not turned over to the blind remedy of uncertain and complicated assessments, and a devious and doubtful litigation."
>
> *Williams* v. *Parker,* 188 U. S. 491.

The facts of this case insofar as they are stated in appellants' brief are correctly stated.

Actually, however, it is no more than a writ of error to this Court from a denial by the Supreme Judicial Court of a motion for a continuance. This is recognized in appellants' brief (p. 25) where it is stated the owners opposed the application of the attorney general "and contended the enforcement of the statute against their

property ought to be 'stayed until the city's liability could be conclusively determined' (188 U. S. at 493)."

The transcript of record in this Court (p. 14) shows a motion for continuance stating:

> "Under the circumstances it is unjust and inequitable that defendants should be restrained * * * until it is settled that they have a constitutional right to full compensation for the easement in their land taken by the statute and to the damages which they will suffer if their right to maintain the structure is interfered with; which question cannot be determined upon the present information but can only be determined in the pending action for damages against the City of Boston."[1]

In this Court the argument was entirely directed to one question. The brief of plaintiffs in error (p. 15) quoted by Mr. Justice Brewer states:

> "Shortly stated, the question which arises is substantially this: 'Is it consistent with the Federal requirement of due process of law, in the Fourteenth Amendment, for a state court to enforce, by dispossession and destruction of property, a statute of eminent domain, to the validity of which due provision of just compensation is essential, while the questions whether the statute contains any valid and enforceable provision for compensation or damages and the resulting question whether there has been any valid taking of rights in the property are uncertain and are actually disputed in litigation and undetermined.' "

[1]Under the rule in Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 589, infra p. 37, the action against the City of Boston estopped plaintiff from raising any question of sufficiency of remedy and restricted it to argument based on possibility of success by the City in the other action.

The meaning of Mr. Justice Brewer is quite plain therefore when he says "no question is made as to the general solvency of the City of Boston" (p. 503).[1] As in *Sweet* v. *Rechel, supra,* provision was made for a judgment against the city and no constitutional provision forbade its payment as in the present case where a judgment of the Court of Claims would be *brutum fulmen.* The solvency of Boston, so far as the record shows, was not argued in this Court and it having been determined by the Supreme Judicial Court that the legislature might impose the burden of payment on the city of Boston this Court held the statute was not in conflict with the Federal Constitution.

Williams v. *Parker* has been cited:

In *Mt. Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S. 30, 33 where it is stated:

> "The right to take possession before the compensation is finally determined also is not argued. *Williams* v. *Parker,* 188 U. S. 491, 502";

In *Joslin* v. *Providence,* 262 U. S. 668, 677 in a statement that there must be "adequate provision for enforcing the pledge";

In *Bragg* v. *Weaver,* 251 U. S. 57, 62 on the subject of taking prior to payment of compensation.

Crozier v. *Krupp,* 224 U. S. 290.

In *Crozier* v. *Krupp* the bill of complaint alleged the plaintiff owned patents for improvements in guns and gun carriages and that defendant, William Crozier was making and using guns which embodied in their construction the patented devices.

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[1]Under the rule in the Great Falls Mfg. Co. Case no such question could be raised by plaintiff.

A stipulation (R., 10) was made by the parties and it was upon this stipulation that the case came up on demurrer. The relevant portion of the stipulation is as follows:

> "Defendant stipulates and agrees that the Government of the United States of America and the Ordnance Department of said Government have manufactured. are now manufacturing, and intend to continue the manufacture and use, or to cause to be manufactured for their use, field guns and carriages made after the so-called 'Model of 1902' referred to in the bill of complaint, the claim[1] or claims of complainant being in nowise admitted; that the defendant, William Crozier, sued in this suit is an officer in the United States Army and Chief of the Ordnance of the United States Army, and is the officer in charge of such manufacture of said field guns and carriages for the United States."

The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. The Court of Appeals having reversed the decision of the lower court defendant petitioned this Court for certiorari. The Solicitor General in the petition for certiorari wrote in part as follows:

> "The property element which was referred to in the case of Belknap *v.* Schild[2] and in the case of the International Postal Supply Co. *v.* Bruce,[3] is also present in a large sense in the case at bar. The raw materials and the crude products which are in process of being bound and assembled in the complete design are the properties of the United

[1] Of a patent or its infringement.
[2] 161 U. S. 10.
[3] 194 U. S. 601.

> States. The physical things, the subject of the alleged infringement, whether already matured in the process of construction, in the finished model or as yet in fieri, are solely the property of the United States. The Model of 1902, according to which the Government is manufacturing its field guns, is the Government's own model and its sole property. The arsenals at Watervliet and Rock Island and the work-shop at Bridgeport are the Government's possessions. More especially the very employment and enterprise of the Government to manufacture ordnance as a necessary means to perform its sovereign duty in maintain an army is exclusively the Government's right of property and is especially entitled to the protection of the court."

The writ of certiorari having been granted the Attorney-General in his brief wrote:

> "Consequently the exact question presented upon this record is whether the courts have any jurisdiction *to restrain the United States* from the manufacture of ordnance, in the course of its work in equipping and maintaining its army because of the claim of a German company that such manufacturing employs its inventions without its consent."

The Attorney-General in his brief quotes *Minnesota* v. *Hitchcock,* 185 U. S. 373, for the proposition that the question whether the United States is a party to the controversy is not determined by the mere nominal party on the record but by the kind of judgment or decree which can be entered and continues:

> "The respondent makes no claim that it has title to the materials of which the models are made, as indeed it could not do. Its claim is that the

infringement occurs in the combination or fashioning of these materials into the models, so that the act sought to be restrained is the combining, the fashioning or the making. *But this is an intangible and immaterial act springing out of the manipulation and utilization of actual and tangible property of the United States.* Accordingly the force of the injunction does not strike the intangible and technical trespass involved in the mere borrowing, if such the fact be, of respondent's devices but behind that strikes upon the actual use of the physical property of the United States in which such a borrowing of ideas may be employed. * * * Even though the Government made compensation for the articles the respondent would have it that by virtue of letters patent of the United States it was entrenched in a position where it could refuse to sell these articles to the United States and prohibit the United States from taking them, even upon making proper compensation. *It is submitted that a very important branch of public policy supports the doctrine of the immunity of the United States from being sued and enjoined by a patentee under such circumstances as these.*" (Italics supplied.)

This argument explains fully the language of the opinion of this Court (p. 305) where, after stating the provisions of the act of 1910 giving patentees the right to recover reasonable compensation for infringement by the United States in the Court of Claims, the Chief Justice continues:

> "This being the substantial result of the statute, it remains only to determine whether its provisions are adequate to sustain and justify giving effect to its plain and beneficent purpose to furnish additional protection to owners of patents when their rights are infringed by the officers of the Government in the discharge of their duties.

"This inquiry may be solved, under the conditions here involved, by taking the most exacting aspect of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use. Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, *again always having reference to the nature and character of the property taken, its value and the surrounding circumstances,* the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication of the public good faith to that end.

"Coming to apply these principles and *confining ourselves in their application, as we have done in their statement, strictly to the conditions here before us, that is, the intangible nature—patent rights—of the property taken, the great possibilities in the essential operations of government that such rights may be invaded by incorporating them into property of a public character, of the vital public interest involved in the subject-matter of the patents in question and the grave detriment to the very existence of government which might result from interference with the right of the government to make and use instrumentalities of the character of those with which the patents in question are concerned,* of the purpose which the statute manifests to add additional protection and sanction to private rights, and the pledge of the good faith of the government which the statute plainly implies to appropriate for and pay the

compensation when ascertained as provided in the statute, we think there is no room for doubt that the statute makes full and adequate provision for the exercise of the power of eminent domain for which considered in its final analysis it was the purpose of the statute to provide. *Indeed, the desire to confine ourselves to the particular case before us* has led us to state and limit the doctrine which we here apply, when it was possibly unnecessary to do so. *We say this because no contention was made in argument by counsel for the corporation that the statute of 1910 does not provide methods of compensation adequate to the exercise of the power of taking for which the statute provides.* Thus, in the argument, it is said: 'If the officers of the United States have since the act * * * used or shall hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under the act in the Court of Claims,'—this statement being followed by an insistence that even although this be the case the statute is not controlling because it was enacted after the bill was filed and did not therefore retroactively deprive the court below of the power to afford relief under the conditions existing when the suit was commenced." (Italics supplied.)

Hays v. *Port of Seattle,* 251 U. S. 233.

This case involves no question of eminent domain. The plaintiff in error had made a contract with the State of Washington to dredge Smith's Cove in Seattle. The legislature then passed an act creating the Port of Seattle, abandoning the improvement on which plaintiff was engaged and vesting title to the waterway in the Port (Sess. Laws, 1913, p. 195).

No land of plaintiff or anyone for that matter was taken, the only question being whether the obligation of the contract to dredge Smith's Cove was impaired in violation of Section 10, Article I of the Federal Consti-

tution and whether under the Fourteenth Amendment compensation must be provided for such impairment. This Court held that at most there was a breach of contract for which plaintiff might be remitted to an action for damages under the Washington Code.

The Code provision for an action and payment of judgment out of the state treasury was held sufficient due process as "an adequate provision for assured payment" (p. 225) *no question being raised anywhere in the case of the enforcibility of the judgment, or availability of funds for its payment.*

Joslin v. *Providence,* 262 U. S. 668.

There the municipality was empowered to condemn land and the record shows and Mr. Justice Sutherland drew attention to the fact that "as an additional guaranty that the judgment will be paid, and paid promptly, the owner under the statute may have execution against the City."

Bragg v. *Weaver,* 251 U. S. 57.

There the record discloses and Mr. Justice Van Devanter emphasizes that:

> "It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required."
>
> *Pauchogue Land Corporation* vs. *Long Island State Park Commission,* 248 N. Y. 635; c. d. 278 U. S. 657.

This was the second decision of the Court of Appeals in the Pauchogue case. The judgment was affirmed in a memorandum decision:

"Judgment affirmed, with costs, upon the ground that the property in suit has been lawfully appropriated (243 N. Y. 15)."

Examination of the record shows that prior to September 23, 1925 the Long Island State Park Commission received from Mr. August Heckscher a gift of $250,000 with interest at 6% for ten months deposited in Empire Trust Company for the express purpose of establishing its title to the land involved in the action. Upon the prior appeal the Court of Appeals had held, irrespective of any other question raised, that the appropriation and entry on December 4, 1924 was illegal by reason of the provision in Chapter 112 of the Laws of 1924, Section 8, giving the Commission power from "monies or property on hand *or* appropriated for its use to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction." The Court of Appeals held this at once a grant of power and a limitation on the exercise of such power and finding no other grant of general power in the Act held that in the absence of an appropriation by the Legislature the entry was illegal.

Subsequent to Mr. Heckscher's gift, and on September 23, 1925, the Commission made another entry and appropriation. It was shown at the trial that the amount of the Heckscher gift was more than the plaintiffs had been willing to accept at the outset of negotiations and evidence of value was produced by the Commission in the form of expert testimony. Any substantial federal question left the case when the Court found the property not worth more than the moneys on hand.

Upon the first appeal, Judge POUND wrote (243 N. Y. 15, 26):

"We come next to a question of statutory construction rather than one of constitutional law.

> Section 8, Laws of 1924, Chapter 112, defines the general powers of the Commission. 'It shall have power from monies or property on hand or *appropriated for its own use* to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction.' This is at once a grant of power and a limitation on the exercise of such power. It may acquire real estate for park purposes from money on hand or appropriated for its own use. No other grant of general power is contained in the Act."

The first appeal therefore was decided without reference to any question of constitutional law, demonstrating that the language of the learned Judge as to a pledge of public faith and credit upon which these defendants rely was dictum and by way of covering points in the briefs.

Although the second appeal was in the same action, the case involved a separate and distinct entry in September 1925 after a sum greater than that which the plaintiffs had been willing to accept and also greater than the value of the property as proved by competent evidence had become available. Once the Court of Appeals decided that this sum of money was available to pay compensation the constitutional question left the case and the only question which remained was "a question of statutory construction" involving no substantial federal question.

It is apparent from the briefs both in the Court of Appeals and upon the application to the Supreme Court for a writ of certiorari that no constitutional question was involved because the Long Island State Park Commission was in funds sufficient to provide adequate and certain compensation and applicable to no other purpose.

It is not a fact as stated by appellants that in the first Pauchogue Case "The Court of Appeals expressly over-

ruled the constitutional objection, finding the pledge of the general credit of the State, given by Section 59, a complete answer (243 N. Y. at pp. 24-5)" (Appellants' Brief, p. 32). Both appeals were decided as questions of statutory construction.

Two other cases cited by appellants for the proposition that no antecedent appropriation of funds is necessary in eminent domain illustrate how far short of sustaining this proposition their authorities fall.

> *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 599.

This case is cited (Appellants' Brief, p. 46) in support of an alleged presumption that the sovereign will pay its debts and discharge its obligations. The statute there under consideration was the Act of Congress approved July 15, 1882 (22 Stat. at L. 168) of which section 1 provided:

> "* * * and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States."

On the question of enforcing payment, this Court said of the effect of a suit commenced in the Court of Claims:

> "By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States, but must wait an appropriation for its payment. When it resorted to that Court, it knew that its judgments against the United States could only be paid out of money appropriated for that purpose by Congress. In short the plaintiff has voluntarily accepted the provisions of the Act of Congress in respect to the mode of ascertaining the

compensation to be made to it. *This view cannot work any permanent injury to the plaintiff; for that Act expressly declares that title to the premises in question shall not vest in the United States until the owner receives payment therefor.*"

Shoemaker v. *U. S.*, 147 U. S. 282, 285-6[1].

The Act of Congress approved September 27, 1890 (26 Stat. at L. 492) provided in Section 3 for appraisal of land taken and continued:

> "And if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said Court, *upon depositing the appraised value in said Court* to the credit of such owner or owners, respectively, the fee simple shall in like manner be vested in the United States."

Section 5 provided:

> "That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the Court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said Commission *shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the Court, possession of the property may be taken.*"

Rockaway Pacific Corp. v. *Stotesbury*, 255 Fed. 345.

This case settles all the questions in the present suit. Appellants assert (Brief, p. 43) that:

> "The statutory court entirely misconceived the legislation involved in Rockaway Pacific Corpora-

[1]Cited Appellants' Brief, p. 39.

> tion *vs.* Stotesbury, and therefore misconceived the decision rendered".

It is as impossible to infer from the title of the Act in that case that its purpose was to turn land over to the Government of the United States as it is to find in the body of it an intention "that the property thus taken should be paid for not by the State but by the Federal Government". It is because of such an intention, according to appellants, that the statute did not pledge the credit of the State and is therefore distinguishable from the statute here.

The opinions of Ward and Rogers, Circuit Judges, (255 Fed. 345, 346, 351) show their decision was not based upon any lack of such a pledge of State credit but upon decisions summarized by Judge Ward (p. 350):

> "Still an appropriation law must be passed, because in no other way can compensation be secured in accordance with the provisions of the constitution and the long established practice under it,"

a conclusion in which Judge Rogers concurred, citing State and Federal decisions.

The dissenting opinion of Judge Hough emphasizes the *ratio decidendi* of the majority because he was of opinion that "the statute complained of does pledge the credit of the State and the public purse to make full reparation to plaintiff". The opinion of Judge Ward, based upon the provision of Section 21, Article III, of the Constitution of New York forbidding the payment of money out of the treasury of the State or any of its funds or any funds under its management, except in pursuance of an appropriation by law, shows, (in connection with his statement that "it was not thought sufficient to leave the citizen to the obligation to pay that might be implied by law", (p. 348), and Judge Rogers' statement (p. 353) "so that at this time no adequate means are provided whereby the owner of the property can be compensated

for its taking''), that the *Rockaway* case distinctly holds a pledge in any language, however ''express and unmistakable,'' is insufficient for a taking by due process.

One paragraph in the opinion of Judge Ward determines that the *Rockaway* case is exactly in point and decisive of the question here:

> ''We think that, to make chapter 13 of the Laws of 1917 constitutional, it must be accompanied by a law appropriating funds to pay such an award as the Court of Claims shall make. The amount of the compensation is a judicial, and not a legislative, question. Still an appropriation law must be passed, because in no other way can compensation be secured in accordance with the provisions of the Constitution and the long established practice under it.''

The act was therefore held unconstitutional not because in the language of appellants (p. 44) it ''omitted to pledge the State's credit'' but because it was not ''accompanied by a law appropriating funds to pay such an award as the Court of Claims shall make.'' This is exactly the contention of the appellees and the reason for the decision below in the present case.

POINT III.

No enforceable means of obtaining compensation has been provided.

In the court below appellants relied upon a pledge of the credit of the state. Here we are offered (1) Assets outside of bond moneys; (2) Bond issue moneys; (3) General funds of the State. (Appellants' Brief, p. 8 et seq.).

(1)

Assets outside of bond moneys (p. 8).

The supplementary affidavit of White (R., 78):

> "In view of the statements upon the argument, I wish to put upon the record that the New York Commission, on October 9, 1928 (when the Commission offered the plaintiffs $500,000 for the property in suit), and on October 11, 1928 (when the said property was appropriated), had on hand over and above the bond moneys appropriated by L. 1926, Ch. 16, reappropriated by L. 1928, Ch. 75, Part V, and any allocation therefrom—moneys, securities and other properties which could be lawfully used for the acquisition of lands for park purposes in any manner, and which I am informed and believe were of a value in excess of $500,000."

On October 9, 1928 when the Commission offered $500,000 for the property it had already obtained an allocation of that amount (R., 54, 55). It is to be presumed it was this money was offered, $100,000 being reserved for the land in Clarkstown (R., 55).

Ten days after the argument in the District Court the president of the Commission sought to stop the breach with the indefinite statement we have quoted. How much money, the nature and value of the securities or the nature and value of the other properties, none of this is stated. For their availability we have only the affiant's conclusion. For their total value only his information and belief. The statement would be more plausible had the affiant stated with the exactness at his command as president just what his commission possessed and why available for eminent domain. Conclusions do not take the place of facts.

Appellants seek to bring themselves within the rule in the *Pauchogue Case, supra.* There the Long Island State Park Act (L. 1924, ch. 112, §8) provided:

> "It shall have power from monies or property *on hand* or appropriated for its own use to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction."

The Conservation Law under which this present Commission acted creates an additional power to be exercised in the manner prescribed by Section 59 but nowhere gives a power to acquire by appropriation with "moneys on hand" the provision being for acquisition "when moneys have been appropriated therefor".[2]

Once Mr. Hecksher made his gift to the Long Island Commission it had $260,000 as "monies on hand" with which the statute gave it power to acquire the land by appropriation under sections 18 and 21 of the act creating it.

The present Commission is given no such power for no such provision is found in any portion of the law governing it.

(2)

Bond issue moneys (p. 8).

Chapter 602 of the Laws of 1924[1] provides for the issuance of bonds of the State in an amount not to exceed Fifteen million dollars, the proceeds of which are to be paid into the State Treasury and so much thereof as may be necessarily expended is appropriated for the development, improvement and extension of State parks, including the acquisition of lands for that purpose.

[1]Appellants' Appendix, p. 36.
[2]Section 50, idem, p. 22.

Nine separate provisions for as many separate purposes in different localities are made, each provision prescribing the amount which may be appropriated for each purpose (Section 3).

Section 4 of the act provides, "The moneys for the development, improvement and extension of the Palisades Interstate Park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate Park *under the provisions of Chapter 170 of the Laws of 1900, as amended*".[1]

Section 5 of the act provides, "The moneys appropriated for the acquisition of lands under this act shall be available for the payment of the purchase price where lands are acquired by contract or for payments of judgments and awards in case of purchase *by condemnation.* Moneys appropriated for the acquisition of *forest preserve lands,* and of lands in the *Allegheny state park* shall also be available for the payment of judgments and awards in case of proceedings *by entry and appropriation.*"[2]

Section 7 of the act provides that it shall not take effect until after submission to and approval by the people at the general election in November 1924 and prescribes the form of ballot; the form reads: "Shall Chapter 602 of the Laws of 1924 * * * be approved?"

At the general election of 1924 the question was so submitted and received the approval of a majority of all the votes cast for and against the law.

Referendum laws rank next in importance to the constitution and cannot be changed or modified in respect of basic requirements by subsequent legislation.

Half Moon Bridge Co. v. *Canal Bd.*, 91 Misc. 600.
Op. Atty. Gen. (1916) 123.

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[1]Appellants' Appendix, p. 38.
[2]Note distinction between methods of acquiring land in forest preserve or Allegheny park and in the Palisades.

After the bond issue had been approved by the people as required by Section 4 of Article VII of the State constitution the legislature passed another act, chapter 16 of the laws of 1926.[1]

This act makes fifteen separate appropriations for as many separate purposes stating the amount for each. Among others the same amount, $3,500,000, is appropriated for the Palisades Interstate Park.

Section 2, subdivision 2, repeats in the exact language of Chapter 602 of the laws of 1924, supra, the manner in which the appropriation for the Palisades Interstate Park shall be spent, namely condemnation.[2]

Two years elapsed and the commissions found themselves confronted with the provision of Section 21, Article III of the constitution that no money can be paid out of the state treasury "except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act".

Apparently $11,912,850.58 out of the separate appropriations aggregating $15,000,000 remained unspent.

Chapter 75, Part 5,[3] of the Laws of 1928, attempted to reappropriate and make "immediately available *for the same purposes as the former appropriations*" sums described as "unexpended balances of former appropriations" and contains items:

> Palisades Interstate Park Fund.
> By Chapter 199 of the Laws of 1926 (re: $3899.28).
> * * * * *
> "State Park System Fund.
> By Chapter 16 of the Laws of 1926 (re: $11,912,850.58)".

[1] Appellants' Appendix, p. 41.
[2] Idem, p. 44.
[3] Idem, p. 53.

Chapter 602 of the Laws of 1924, Section 4, and Chapter 16 of the Laws of 1926, Section 2, Subdivision 2, had expressly prescribed that the moneys therein provided shall be expended and lands acquired by defendant, Board of Commissioners, under the provisions of Chapter 170 of the Laws of 1900, as amended.

Section 16[1] of Chapter 170 of the Laws of 1900, reenacted as Section 759[2] of the Conservation Law by Chapter 242 of the Laws of 1928, provides that the Commissioners of the Palisades Interstate Park *shall not acquire title to or enter into possession of any premises under condemnation until after an award has been paid to the owner or deposited with the county clerk and that such payment should operate to transfer the title to the said commissioners.*

When Chapter 602 of the Laws of 1924 was enacted and when the People of the State of New York ratified it at the general election of 1924 and when Chapter 16 of the Laws of 1926 and Chapter 75 of the Laws of 1928 were enacted, the law prescribed *only one method of compulsory taking of private property* by the Commissioners of the Palisades Interstate Park, namely, condemnation proceedings as specifically set forth in Chapter 170 of the Laws of 1900.

The appropriation was made to pay awards under the laws of 1900, 1924 and 1926. It specifically reappropriates for the same purposes moneys which the laws of 1924 and 1926 provided to pay awards in condemnation cases in the Palisades Interstate Park.

The attempted acquisition by the Commissioners of the Palisades Interstate Park of the premises owned by the plaintiffs on the contrary purported to be made under and by virtue of the new power granted by Section 761, (Deft's Ex. 1, R. 64).

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[1]Appellants' Appendix, p. 19.
[2]Idem, p. 33.

A valid exercise of this power by the Commissioners would have caused the title to the land appropriated to pass from the owner to the People of the State.

> Section 59, subdivision 3, Conservation Law.
> *Kahlen* v. *State of New York*, 223 N. Y. 383.

In condemnation under the re-enacted provisions of Chapter 170 of the laws of 1900[1] "payment shall operate to transfer the title to the said Commissioners."

The use of any funds resulting from the sale of bonds authorized by Chapter 602 of the Laws of 1924 has never been authorized by the People for the acquisition of lands by appropriation by the Board of Commissioners of the Palisades Interstate Park. The moneys available under Chapter 16 of the Laws of 1926 could be expended only in the manner provided for in that particular Act and pursuant to and in compliance with the laws, namely, Chapter 170 of the Laws of 1900, which regulated at the time of referendum and appropriation the acquisition of the lands by the Palisades Interstate Park Commission. The People did not authorize nor has the Legislature ever attempted to appropriate money with which the Commission may acquire land in any way other than that prescribed by law at the time the fund for such acquisition was created.

Appellants are forced to argue that the addition of Section 761 to the Conservation Law by Chapter 242 of the Laws of 1928 was an "amendment" of the original Palisades Park Act (L., 1900, Ch. 170) because although repealed by the Act of 1928 its contents were substantially re-enacted by it (Appellants' Brief, p. 50).

The provisions of Chapter 242 of the Laws of 1928 expressly exclude any such construction. The reenacted

[1] §16, Appellants' Appendix, p. 19.

provisions of Chapter 170 of the Laws of 1900 are a part of Article XVI of the new law, as is Section 761.

Section 662 of the new law (printed in Appellant's Appendix, p. 27) is also part of Article XVI and it provides:

> "* * * but this provision shall not apply to such acquisitions made or to be made pursuant to Chapter sixteen of the laws of nineteen hundred and twenty six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty four, *and such chapter shall not be affected or impaired by this article*".

Obviously if Chapter 16 of the Laws of 1926 is not affected or impaired by Article XVI of the new law the addition of Section 761 as a part of Article XVI will not affect or impair that portion of Chapter 16 of the Laws of 1926 which incorporates Chapter 170 of the Laws of 1900.

Admitting an amendment may be an addition to a statute another difficulty in which appellants find themselves is that this question is settled by the Court of Appeals against them as well as by the General Construction Law of the State (L., 1909, Ch. 27) which provides:

> "§ 80. References to repealed provisions. If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision."

The General Construction Law applies to every statute unless a contrary intention is shown.

Matter of Bronson, 150 N. Y. 1.

When therefore it is provided in Chapter 602 of the Laws of 1924[1] and in Chapter 16 of the Laws of 1926[2] that "the moneys for the development, improvement and extension of the Palisades Interstate park shall be expended and the lands shall be acquired by the commissioners of the Palisades Interstate park under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended" the effect of section 80 of the General Construction Law was to add:

> "and if chapter one hundred and seventy of the laws of nineteen hundred, as amended, be repealed and in substance re-enacted, the moneys shall be expended and the lands acquired under such re-enacted provision."

Section 761 is not a re-enacted provision and cannot therefore be incorporated in the acts of 1924 and 1926.

Bohmer v. *Haffen*, 35 App. Div. 381, 386; aff'd 161 N. Y. 390, 405 is cited as authority for the proposition that "an amendment may be an addition to as well as an enlargement of the statute existing at the time of such amendment" (Appellants' Brief, p. 50). In that case the question was whether section 16, article III of the state constitution, providing that "no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title," had been violated by chapter 340 of the laws of 1892, entitled "An act to amend Chapter three hundred and sixty one of the laws of eighteen hundred and sixty three, entitled an act to authorize the construction of a railway and tracks in the towns of West Farms and Morrisania, and all acts amendatory thereof."

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[1]Appellants' Appendix, p. 38.
[2]Idem, p. 44.

Section 6 of the amendatory act gave a new power of consolidation.

The Court of Appeals, with one dissent, was of opinion:

> "Anything germane to the general subject of building and operating a railroad might have been included in the original act of 1863, provided always it was not prohibited by some constitutional provision. And that which might have been included in the original act without offending the constitutional provision under consideration, may be incorporated into it subsequently by amendment without change of title."

The opinion moreover calls attention to the title of the act of 1892, quoted above, and says:

> "Its title purports to effect a single object, namely, the amendment of a particular statute, and necessarily calls attention to the fact that the purpose is to add to, or deduct from, the authority granted by it. In that respect at least the usual method of amendatory legislation has been followed, and, because it authorizes something not permitted by the original act, it does not necessarily add to the number of subjects embraced in the legislation" (p. 405).

Chapter 242 of the laws of 1928[1] on the contrary is entitled "An Act to *amend the conservation law*, generally, and to conform the same to the state departments law, and *repealing* certain provisions of article eight of the state departments law, and *certain other statutes.*" (Italics supplied).

That this is an amendment of the conservation law is emphasized throughout, the portion dealing with the

[1]Appellants' Appendix, p. 21.

new division of parks in which this commission is included being typical.[1] It reads:

> "§41. Such chapter is hereby amended by inserting therein a new article, to follow article fifteen, to be article sixteen, to read as follows:
>
> ARTICLE XVI.
>
> DIVISION OF PARKS.
>
> Part 1. . . . . .
>
> . . . . . .
>
> . . . . . .
>
> 9 Commissioners of the Palisades Interstate Park (§§745-760)."[2]

The only mention of chapter one hundred and seventy of the laws of nineteen hundred occurs in the last section:

> "§50.[3] The following laws are hereby repealed together with any laws amendatory thereof or supplementary thereto:
>
> . . . . . .
>
> chapter one hundred and seventy of the laws of nineteen hundred; . . ."

The legislature had no idea or intention of amending the original Palisades Park act. If it survives at all it survives as amended prior to its repeal and substantial reenactment. Chapter 242 of 1928 expressly repeals the original Palisades Park act and then *amends the conservation law "by inserting therein a new article"* containing the provisions of the original act and an added provision.

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[1] Appellants' Appendix, p. 27.
[2] Laws of New York, 1928, p. 654.
[3] Appellants' Appendix, p. 35.

When a specific statute is incorporated into another statute as Chapter 170 of the Laws of 1900 was incorporated in Chapter 602 of the Laws of 1924 and in Chapter 16 of the Laws of 1926; in such a case what is incorporated is strictly the law at the time of the incorporation and the *incorporating statute is not deemed changed in correspondence with amendments to the incorporated act.*

Carling v. *Purcell,* 3 Misc. 55, 56.
Knapp v. *The City of Brooklyn,* 97 N. Y. 520.
Matter of Alter'g. etc. Main St., Sing Sing, 98 N. Y. 454.

In the case last cited the charter of the village of Sing Sing (L. 1859, Ch. 439) provided that in proceedings to lay out, open and widen streets the trustees shall conform to the provisions of Article 4, Title 1, Chapter 16, Part 1 of the Revised Statutes being the General Highway Law.

In 1875 the latter statute was amended (L. 1875, ch. 431) so as to change the method of selecting jurors.

In 1880 the legislature enacted Chapter 568 entitled "An act to consolidate, amend and revise the charter of the village of Sing Sing." Section 38 of this act was a re-enactment of the provisions of the prior act which had incorporated the General Highway Law contained in the Revised Statutes.

On certiorari to review street opening proceedings it was objected that jurors had not been drawn according to the amended General Highway Law.

The Court of Appeals said:

> "Except for the re-enactment of the section in the charter of 1880, it would be plain that the change in the manner of selecting jurors under the general statute, made by Chapter 431 of the Laws

of 1875, amending the Revised Statutes, and providing that jurors should be drawn by the town clerk, etc., would not apply to the village of Sing Sing. The charter of 1859, which makes the provisions of the Revised Statutes, in reference to the laying out, etc., of highways, applicable to the laying out, widening, etc. of streets in the village, necessarily referred to the provisions of the General Highway Act, then existing. A subsequent amendment of the general law would not operate *ipso facto* as an amendment of the charter. If the act of 1859, in place of incorporating by reference the provisions of the Revised Statutes into that act, had re-enacted those provisions in full, it could not be claimed that subsequent amendments of the general law would change the charter, and the case is not changed by the mere form of the enactment."

In *American Bank* v. *Goss*, 204 App. Div. 759, 760, it is written:

"It is a well-settled rule of interpretation of statutes that where a statute expressly or by necessary implication adopts another, that statute must be deemed to have incorporated the statute adopted *ipsissimis verbis*, and future additions to or modifications of the latter are not included in the adoption, unless a contrary intention is clearly manifested. This rule of law was cited in *Carling* v. *Purcell* (3 Misc. Rep. 55) and authorities cited. In Sutherland on Statutory Construction (Vol. 2, p. 787) the law is stated to be as follows: 'Where one statute adopts the principal provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. * * * Such adoption takes the statute as it exists at the time of adoption and does not

include subsequent additions or modifications of the statute so taken, unless it does so by expressed intent.' (See, also, Endlich Interp. Stat. § 492; *Knapp* v. *City of Brooklyn*, 97 N. Y. 520; *Matter of Main Street, Sing Sing*, 98 id. 454; *People* v. *Damron*, 160 App. Div. 424.) In fact, this rule of interpretation is so well recognized that I have been able to find no cases whatever in which an exception has been made thereto."

It is therefore the law of New York, aside from the provisions of the law itself, that when Chapter 242 of the Laws of 1928 repealed and reenacted Chapter 170 of the Laws of 1900 the reference to it in Chapter 602 of the Laws of 1924 and in Chapter 16 of the Laws of 1926 remained a reference to it as it stood when the incorporating statutes were enacted.

People ex rel Garvey v. *Prendergast*, 148 App. Div. 129, cited by appellants (p. 51) does not deal with amendments.

In *Harris* v. *White*, 81 N. Y. 532, the reference in the Revised Statutes was not to a particular statute but in general terms to all the special laws on the subject and the intention of the legislature plain that the incorporating statute being a *general* law should incorporate subsequent *special* acts.

Board of Excise v. *Curley*, 9 Abb. N. C. 100; 69 N. Y. 608, held that chapter 327 of the laws of 1874 which provided that the provisions of chapter 628 of the laws of 1857 "shall be taken and construed as part of this act" referred to the act of 1857 as amended *at the time the incorporating statute was enacted.*

Mundy v. *Excise Commissioners of New York*, 9 Abb. N. C. 117, deals with the same matter of amendments before the passage of the incorporating statute.

The result is that no portion of the bond issue moneys are available for a taking by appropriation but must be expended and lands acquired by condemnation as provided in the Palisades Park Act as it existed on February 24, 1926 when chapter 16 of the laws of 1926 became a law.

Bond moneys, however, are not available because the appropriation under chapter 16 of the laws of 1926 lapsed and was not lawfully reappropriated.

Chapter 16 of the laws of 1926[1] separately appropriated and made available the sum of $3,500,000 out of the bond issue for acquisition of land by this commission *by condemnation.*

Section 21, article III of the state Constitution[2] forbade payment of the money out of the state treasury unless made within two years after the passage of the appropriation act which became a law February 24, 1926.[3]

Two years elapsed and an unexpended balance aggregating $11,912,850.58 remained out of the separate appropriations made in 1926.

Chapter 75 of the laws of 1928 became a law February 17, 1928.[4]

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[1]Appellants' Appendix, p. 41.
[2]Idem, p. 4.
[3]Idem, p. 41.
[4]Idem, p. 53.

Part V[1] provides:

PART V.

"SECTION 5. The following sums, or so much thereof as may be necessary, being the unexpended balances of former appropriations, are hereby reappropriated and made immediately available *for the same purposes* as the former appropriations."

* * * * * *

State Park System Fund.
By Chapter 16 of the laws of 1926 (re: $11,912,850.58)."

Chapter 16 of the laws of 1926 created no State Park System Fund but on the contrary made fifteen separate appropriations for as many diverse purposes.[2]

An attempt to reappropriate fifteen separate appropriations as one Fund does not comply with Section 21, Article III of the State Constitution[3] which requires a reappropriation act must (1) specify the sum appropriated, (2) specify the object to which it is to be applied and (3) must not refer to any other law to fix the sum.

In *People ex rel. Hopkins* v. *B'd Sup'rs Kings Co.*, 52 N. Y. 556, the Court of Appeals held Chapter 700 of the laws of 1872 unconstitutional because, like Chapter 602 of the Laws of 1924, it enumerated a number of separate appropriations and then in Section 2 assumed to authorize a debt "for the single object of raising the money to pay the appropriation herein named". In Section 5 it provided that "this act shall be submitted to the people at the next general election to be held in this state".

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[1]Appellants' Appendix, p. 53.
[2]Idem, pp. 41-44.
[3]Idem, p. 4.

The Court of Appeals held the act unconstitutional as violative of the provisions of Section 12 of Article VII of the State Constitution now contained in Section 4 of Article VII,[1] providing that "no law authorizing a debt to be contracted can take effect until assented to by the people, and but one law for that purpose can be submitted at the same general election or within three months of its passage, and the debt to be created must be for some single work or object to be distinctly specified in the law."

Allen, J., wrote upon this subject in part as follows:

> "The appropriations are in fact many, and their objects many and diverse, and they cannot be reduced to one, and the objects and works made a unit by the mere dash of a pen or the construction of a sentence. Neither is the object of the debt made single by declaring it to be for the payment of the aggregate of all the sums of money appropriated by the act.
>
> "The 'work or object' contemplated by the Constitution is the public work or object to be accomplished by the expenditure of the money to be borrowed. If an appropriation had been made for a single work or object, a debt might perhaps be created for the payment of that one appropriation, upon the principle that that is certain which can be made certain; and by reference to the law making the appropriation the object or work for which the debt was to be contracted would be ascertained. Still, this would not be the best or a desirable form of legislation, and would be of doubtful validity.
>
> "The design of the Constitution was that the specific purpose of the debt should be specified in the act, that the legislature and the people, who were to vote upon it, could read it there; and a departure from the letter of the provision may frustrate its intent. It is true, here the appropriations and the authority for the debt are in the same act; so that the law is not obnoxious to the objec-

[1] Appellants' Appendix, p. 5 and supra p. 14, in full.

tion that would exist if they were in separate acts.[1] But the difficulty remains that, notwithstanding the form of the second section, the 'work or object' for which the debt is authorized is not a single work or object; neither are the objects defined or capable of being ascertained from the act itself."

* * * * * *

"It is not difficult, and ought not to be regarded as an unreasonable or onerous requirement, to state the 'object' to which an appropriation is to be applied, or the 'single work or object' for which it is proposed to create a State debt or the 'object' for which a tax is deemed necessary, and to which it is to be applied."

And to illustrate the vice of an act drawn as was the one under consideration the learned Judge wrote:

"The act appropriates, in different sums varying from $2,500 to over $4,000,000, respectively, an aggregate amount of over $6,000,000; but each appropriation is for a different work or object. The Constitution would be of little value as a restraint upon the debt creating power if it could be evaded by bringing together in one law distinct appropriations of different amounts, for a canal in one part of the State, in aid of a railroad in another, building a lunatic asylum in another, and a State prison and a normal school building in still other parts; and then a debt could be authorized for the single object of raising the money to pay the 'said appropriation'."

All that was said in this opinion applies to the acts of 1924 and 1926 and the attempted reappropriation in Chapter 75, Part V, page 224 of the Laws of 1928. Chapter 602 of the Laws of 1924 contains nine distinct appropriations of different amounts for different purposes in different parts of the state. Chapter 16 of the Laws of 1926 attempts to make, out of moneys realized from

[1] As in the present case.

the sale of bonds issued in pursuance of the provisions of Chapter 602 of the Laws of 1924, fifteen distinct appropriations of different amounts for different purposes in different portions of the state.

In *Half Moon Bridge Co.* vs. *Canal Board,* 91 Misc. 600, the Court held that Chapter 801 of the Laws of 1913 amending the Barge Canal Act, by which private bridges and their franchises were made subject to condemnation for the barge canal was not within the power of the Legislature to enact, being in direct conflict with Section 4, Article VII, of the Constitution, pursuant to which the Barge Canal Act became a law.

There the plaintiff owned and operated a toll bridge across a section of the Mohawk River which was being canalized for the barge canal. The canal board attempted to appropriate a part of plaintiff's lands at each end of the bridge which, with the constructions in the river, involved the destruction of the bridge. Plaintiff sued to enjoin the destruction of the bridge except on condition that the State build a new bridge for plaintiffs on the site of the old one. The canal board denied the liability of the State to restore the bridge and asserted a right to destroy it without compensation or substitution of another bridge. On the pleadings as originally made the action was tried and the parties submitted the case for decision. Before a decision was reached by the trial court the canal board procured the passage of Chapter 801 of the Laws of 1913 amending the barge canal act so that private bridges and their franchises were made subject to condemnation for barge canal purposes, and under the amending act took necessary proceedings to condemn plaintiff's bridge and procured an order permitting the service of a supplemental answer. On the pleadings as so amended the parties submitted the case on the evidence originally taken before the filing of the supplemental answer with the

further proof by the canal board that the bridge had been condemned by the State under the amended act. Mr. Justice Borst wrote:

> "The sole question left for determination and now presented is, was the amended act under which the bridge was condemned within the power of the legislature to enact? If it was, plaintiff must go to the Court of Claims to secure its damages, and judgment in this action must go to the defendants. As the case stood when the parties first submitted it to the trial court, the plaintiff was entitled to the judgment it was demanding. The Barge Canal Act, as it then was, provided: 'New bridges shall be built over the canal to take the place of existing bridges wherever required or rendered necessary by the new location of the canal.'
>
> It has been held that, under this provision of the statute, the state could not condemn the bridge but must rebuild it. *Halfmoon Bridge Co.* v. *Acme Construction Co.*, 157 App. Div., 183; *Halfmoon Bridge Co.* v. *Acme Construction Co.*, 163 id. 76; reversed on other grounds, 213 N. Y. 160."

After setting forth the provisions of Section 4, Article VII, of the State constitution Mr. Justice Borst continued:

> "Before the Barge Canal Act could become a law its passage was required with certain formalities as we have seen, not prescribed for the passage of ordinary enactments by the legislature, and then went to the people for their approval. If it could be amended by the legislature, except in the manner prescribed by the Constitution, the formality of its passage is not apparent. If the act could be changed or nullified at the will of the legislative body, its approval by the people would seem to have been without reason or necessity. If it was contemplated that it might be amended generally by the legislature, then the provision for the specified amendment contained in the Constitution is without force or effect.

> "It thus appears that the amendment to the Barge Canal Act sought to be upheld in this action is in direct conflict with the plain provisions of the Constitution. The vote of approval by the people was required and taken with the understanding that the act could only be modified in the two ways specified by the Constitution*, and it was not so modified. If that expression of approval by the people upon an act is to stand for anything more than a mere formality, the amendatory act in question must fail of sanction by the court. The legislature was therefore without authority to pass the amendatory act, and the proceeding taken under it to condemn plaintiff's bridge and franchises for the uses of the state was without authority and must fail."

From this decision the Attorney General took no appeal.

The law therefore is that because the Barge Canal Law, approved by popular vote, provided that another bridge should be built to replace the old one it was beyond the competence of the Legislature to enact that the old bridge property might be taken by eminent domain. The converse of the proposition is presented in the present case. Chapter 602 of the Laws of 1924 approved by the electorate under the same constitutional provision which required approval of the Barge Canal Law provides that property must be acquired by the defendant, Board of Commissioners, according to the provisions of Chapter 170 of the Laws of 1900 as amended, namely, condemnation. The defendant Board of Commissioners have sought to appropriate leaving plaintiffs an imaginary remedy in the Court of Claims.

Therefore the Legislature, being expressly limited by Section 4, Chapter 602 of the Laws of 1924, and the vote

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* Repeal, if no debt has been contracted, or forbid contracting any further debt. Const. Art. VII, §4.

of the People approving the same, had no power to authorize the Palisades Interstate Park Commissioners to acquire, by appropriation, lands compensation for the taking of which would have to be paid out of the bonds approved by the Referendum of 1924; and the Board of Commissioners of the Palisades Interstate Park have no power and authority to expend moneys provided by the Acts of 1924 and 1926 in any manner other than that authorized by Chapter 170 of Laws of 1900, as amended at the time.

Assuming that Chapter 602 of the Laws of 1924 and Chapter 16 of the Laws of 1926 do not offend the provisions of the Constitution as construed in *People ex rel. Hopkins* v. *B'd Sup'rs Kings Co.*, and *Half Moon Bridge* v. *Canal Board, supra,* and that all that can be said of them is in the words of Allen, J., that they are not the best or a desirable form of legislation, when we come to the item "State Park System Fund" in Chapter 75, Part V, page 224 of the Laws of 1928 and apply to it this decision of the Court of Appeals its violation of Section 21 of Article III of the Constitution is apparent for it does exactly what the Court of Appeals forbade in the case which we have cited by reducing appropriations that are in fact many, with objects many and diverse, to one by the construction of a sentence "State Park System Fund. By Chapter 16 of the Laws of 1926 (re: $11,912,850.58)." The object of the debt is not made single by declaring it to be for the payment of the aggregate of all the sums of money attempted to be reappropriated.

How can anyone tell how much of the eleven million shall go to any particular project without reference to another law to fix the sum?

Chapter 75 of the Laws of 1928 altogether fails to specify the purpose for which the sum of $11,912,850.58 is appropriated and such purpose can be ascertained only

by reference to Chapter 16 of the Laws of 1926. By reason of such noncompliance with the imperative requirements of the Constitution, the appropriation Act of 1928, Chapter 75, Part V, page 224 is void, and of no effect, and the amount designated therein as the "State Park System Fund" is unavailable.

There being no valid law continuing or reviving the appropriation for state park purposes, and the sum provided for by the Act of 1924 and appropriated by the Act of 1926 not being paid or expended within two years next after the passage of the appropriation Act (1926), there is no sum designated for expenditure by the Commissioners for the purpose of acquiring lands for the extension of the Palisades Interstate Park.

The taking of plaintiffs' property under these circumstances is obnoxious to the Fourteenth Amendment as well as the Constitution of the State of New York, Section 6, Article 1 and in direct violation thereof, being a taking of private property for public use without just compensation, or making provision for just compensation.

Moreover, the Court is bound by the decisions of the state courts cited above to hold that any amount reappropriated for this Commission must be spent pursuant to the provisions of Chapter 16 of the laws of 1926. Chapter 75 of the laws of 1928 became a law on February 17, 1928, while chapter 242 of the laws of 1928 upon which appellants rely did not become a law until March 5, 1928.[1] *It is impossible to find that the appropriation act of February 17, 1928 specified as the object to which the sum appropriated is to be applied a method of acquiring land which did not come into existence until March 5, 1928.*

Appellants state (Brief, p. 53) that our sole objection to chapter 75 of the laws of 1928 is that it fails "to specify the object to which the sum appropriated is to be

[1]Appellants' Appendix, p. 21.

applied". We object also that in order to fix the sums appropriated it is necessary to refer to chapter 16 of the laws of 1926 because it attempts to reappropriate the unexpended balances of fifteen separate appropriations *and then to the state comptroller's books to find how much balance each of the fifteen appropriations carried on February 17, 1928.*

It is quite true that chapter 602 of the laws of 1924 is entitled "An Act making provision for issuing bonds * * * in order to create a comprehensive and unified state park system * * *", and the comptroller may have opened one control account in his books against which separate items for the various separate appropriations were charged. It is quite another matter when the legislature comes to reappropriate the sum of the unexpended balances in one lump sum.

In *People ex rel. Hopkins* v. *Bd. Suprs. Kings County*, 52 N. Y. 556, an act was passed appropriating $4,000,000 to meet "the present acknowledged deficiency * * * according to the report of the late comptroller, transmitted to the legislature January 2d, 1872."

It was held these words did not sufficiently state the amount *or* object of the appropriation, the Court saying:

> "The comptroller's report, if admissible, may distinctly specify the duties and liabilities, 'acknowledged and estimated', to whom payable, and for what contracted, but this is not a compliance with the important requirement of the Constitution, that the object as well as the amount of the appropriation shall be distinctly specified in the act" (p. 561).

Here to ascertain how much each of the fifteen beneficiaries are to receive it is necessary to consult books in the office of the comptroller. Just as in the *Hopkins Case* (p. 560) it is said "It is impossible to divine from the law of 1872 which of the many appropriations in the acts referred to were deficient, as to which of the several objects named in these acts the appropriations were to be

applied" so here it is impossible to divine which of the several appropriations had a credit balance or to which objects the appropriation was to be applied.

It is quite true, as stated by appellants (p. 54), that a referendum act is subject to the identical requirement that it distinctly specify its single object (Section 4, Article VII, Constitution).[1] We believe the referendum act, chapter 602 of the laws of 1924 also violated the constitution in this respect but such a ruling is not necessary to sustain the decree.

> *People ex rel. Hopkins* v. *Bd. Suprs. Kings County,* 52 N. Y. 556, 560.

(3)

General funds of the State (p. 10).

Appellants state "the approval of the Conservation Commissioner * * * brought all the resources of the State within that pledge of its general credit which section 59 of the Conservation Law gives" (Appellants' Brief, p. 11).

Section 662 of the Conservation Law, under which it is plain from the preceding statement in the brief (p. 10) such approval was given and which is the only provision in the law for such approval, has this significant provision:

> "Real property shall not hereafter be acquired with state moneys by any such commission, commissioners, society, board, trustees, corporation, association or authority by condemnation or appropriation, except with the approval of the conservation commissioner; but this provision shall not apply to such acquisitions made or to be made pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six relating to expenditures of the proceeds of state bonds authorized by chapter six hundred and two of the laws of nineteen hundred and twenty-four, and such chapter shall

[1] Appellants' Appendix, p. 5.

not be affected or impaired by this article". (Appellants' Appendix, p. 27).

When the Commission after its meeting obtained a new approval from the Governor, acting this time under Section 59, and an approval of the Conservation Commissioner acting under Section 662 of the Conservation Law and, instead of commencing a condemnation proceeding, served on appellees a notice of appropriation for which the new approvals were necessary, it discarded the allocation of $600,000 it had obtained on September 29, 1929 and, unless the extraordinary power attributed to the Conservation Commissioner to bring "all the resources of the State into pledge" exists, no means of compensation whatever, even promissory, was provided.

The approval of the Conservation Commissioner (R., 73-74) was a part of the notice (R., 74) served on appellees, the affidavit of White stating "the appropriation papers" (of which it is a part) "were filed in the office of the Secretary of State and on that day they were served upon the Sparkill Realty Corporation and the Standard Trap Rock Corporation, together with the notice that the lands were appropriated" (R., 61, 62).

It therefore sufficiently appears that the Commission having started to take the property lawfully in condemnation for some reason undisclosed changed to a taking on credit.

The lack of power to pledge the state credit and the insufficiency of such a pledge if it could be made have been shown.

In the present case the record is not voluminous; there are no contracts between the parties and the relevant statutes are not intricate.

Decisions of the Court of Appeals of New York authoritatively and consistently determine all the issues of state law and lay them down one by one as the foundation stones upon which, under the decisions both of this Court and the courts of New York, appellees base their right to

protection under the Fourteenth Amendment against administrative lawlessness.

There are no preliminary questions of state law which have not come before the state courts and been decided in favor of these appellees so that the rule in *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207, and other cases cited by appellants does not in any sense apply.

The construction or application of the Fourteenth Amendment to the condition created by these decisions in one way will defeat appellees and in another sustain them thus bringing the case within the rule in *New Orleans* v. *Benjamin*, 153 U. S. 411, 430, and similar cases.

POINT IV.

Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented.

It is pretense for appellants to argue appellees would suffer no injury by having their compensation paid out of the bond issue moneys (Appellants' Brief, p. 57). The question is whether having been deprived of their property there is any means of enforcing payment out of the bond moneys. If there is no means then appellees have been so deprived without due process and are within the exact class with respect to whom the act of deprivation is unconstitutional.

We contend upon established law in New York that there are no funds in the state treasury out of which payment of just compensation can be coerced. If $600,000 were available then such sum by reason of its insufficiency to pay the award reasonably anticipated for land and improvements, the latter alone costing $1,000,000, does not furnish the certainty of just compensation guaranteed by the Fourteenth Amendment.

The case necessarily involves a question arising under the constitution of the United States and cannot be decided without deciding that question because it must be decided whether and in what amount the Fourteenth Amendment requires an antecedent appropriation of funds before title vests in eminent domain.

As stated in the opinion of the District Court:

> "The jurisdiction of this Court is invoked upon the claim that the plaintiffs property is being taken without due process in violation of the 14th amendment of the Federal Constitution." (R., 90).

The suit is brought to restrain the defendants from enforcing or attempting to enforce the provisions of an act of the Legislature and a notice, description or certificate against appellees or from withholding possession of their property by virtue of such notice and to have it adjudged that the statutes under which defendants assume to act are unconstitutional if construed as appellants construe them.

The bill therefore necessarily and properly alleges the basis of the unconstitutionality and the case is one in which a correct decision depends on the construction of the Fourteenth Amendment since the right set up by appellants may be defeated by one construction and sustained by the opposite construction.

Osborn v. *U. S. Bank,* 9 Wheat, 738.

It is therefore a case arising under the constitution and may be brought in the District Court of the United States.

Railroad Co. v. *Mississippi,* 102 U. S. 96.

POINT V.

All facts essential to the presentation of the federal question appear by the allegations of the bill of complaint.

The absence of an antecedent appropriation and the value of the property are shown by the bill of complaint.

1a. Appellants object (p. 60) that the bill contains a general allegation that the real property and the leasehold are of the value at present in excess of $3,000,000 (R., 8) citing Lewis on Eminent Domain [3d ed.], p. 1253; Matter of William and Anthony Streets, 19 Wend. 678.

The allegation is quite proper and therefore sufficient because as stated by Mr. Lewis at the place appellants cite him:

> "When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights."
>
> Lewis Eminent Domain [3d Ed.] §716, p. 1253.

There is no attempt to enhance the value by a distribution of the title or estate among the owners of different interests. The pleader has followed the rule laid down by Mr. Lewis and supported by his citations and alleged the value as if the property belonged to one person.

(b) Under the rule stated in *Merritt & Chapman Co.* v. *U. S.*, 274 U. S. 611, 612 that a general statement shall be limited by a specific, appellants assert the figure of $3,000,000 must be taken "as including the estimated future profits and value of the quarry in operation."

Appellees' bill adds nothing for expense excluded by the decisions in *Banner Milling Co.* v. *State*, 240 N. Y. 533, or *Joslin* v. *Providence*, 262 U. S. 668, 675, where loss

from compulsory removal of a business to another location was considered or for destruction of a business excluded in *Mitchell* v. *United States,* 267 U. S. 341.

The property taken is a quarry upon which appellees have with the knowledge and encouragement of this Commission, which might at any time if its contentions are sound have stopped them, erected a plant costing a million dollars. The quarry is developed and according to appellants' own statement actual excavation was about to begin operations (Appellants' Brief, p. 6).

N. Y. C. R. R. Co. v. *Maloney,* 234 N. Y. 208, is authority that the use an owner might make of clay deposits in the next forty years by erection and equipment of buildings is immaterial where "so far as the record discloses the land had not been devoted to any particular use" (p. 217). Yet the Court recognized that

> "As bearing upon the question of market value, the owner is privileged to offer evidence as to deposits of certain materials upon the land which might tend to enhance the market value beyond the purposes for which the same was used. * * * The question in such a case is not merely whether the property is peculiarly adopted for the special use claimed for it, even with deposits upon it such as have been enumerated, but whether or not purchasers can be found who would pay more for it because of the adaptability to the use to which the same might be applied."

Here is a property actually developed on appellants' own statement and the allegation in paragraph Seventh of the bill (R., 4) is proper under the *Maloney* case, *supra.* This and the completion of a plant costing one million dollars (R., 5, 6) certainly is evidence that "a purchaser can be found who would pay more for it because of the adaptability to the use to which the same" is ready to be applied.

Orleans County Quarry Co. v. *State,* 172 App. Div. 863, 865-6, cited by appellants on the measure of damages discloses a very different situation to the present. Like all

such cases it is a decision upon the particular facts which were that quarries in the locality sold *uniformly* on an average basis at not more than $1000 per acre, the claimants' own accounts showed cost not to be uniform and that some quarries were profitable and others nearby were not, the Court finding that evidently in this locality the margin of profit in working a quarry is small or doubtful" (p. 865). Here the affidavit of White concedes other quarries on the Hudson "were earning large profits" (R., 58). The award was at the rate of over $10,000 per acre (p. 864) and the Court quite reasonably found the Board had not paid attention enough to the other circumstances bearing directly upon the value of the property and too much to expert evidence and estimates of profits (p. 866).

Yet Mr. Justice Kellogg wrote:

> "Undoubtedly the proof as to the quantity and quality of the stone was important, and the cost of getting it out ready for market; but these are elements to be considered with others in determining the value of the quarry" (p. 865).

If appellants may use appellees' affidavits to construe the bill (note, p. 60) so may we and so doing we find:

A plant modern in all respects (R., 48) ready for operation within 18 miles of New York, with a quarry the physical nature of which reduces cost and makes possible quarrying from a single bench (R., 44, 47, 50), costs including overheads carefully computed by competent witnesses (R., 37, 50, 51) and an assured market (R., 37) at a profit (R., 44).

(c) The bill of complaint includes nothing for personal property not a part of the realty. In that portion to which appellants refer in their brief (R., 6-7) there is the allegation that Standard Trap Rock Corporation, after the Commission's statement it was not going to condemn, contracted for a plant and equipment specially designed and not adaptable for use elsewhere which would have been ready for operation in December 1928 (R., 6)

and that certain personal property was converted by Commissioners to their own use (R., 7). Exhibit F to the bill shows that the only personal property not a part of the plant and therefor of the realty are an automobile truck and office furniture and fixtures (R., 33). The affidavit of White (R., 62) further contradicts appellants' brief by showing whatever personal property there was removed from the premises at the time belonged to contractors and not appellees.

People vs. *Johnson & Co.*, 219 App. Div. 285; affd. 245 N. Y. 627; c. d. 275 U. S. 571 recognizes that the value of fixtures is considered in estimating the total value of property appropriated by the state and for the enhancement of value due to fixtures in a factory the owner should be compensated (219 App. Div. 288).

(d) Appellees agree the bill does not allege the value of personal property on the premises *at the time* of appropriation.

The bill therefore shows a fee and leasehold, taken "as though the property belonged to one person" (Lewis, Eminent Domain [3d Ed.] §716, *supra*) of a total value of more than $3,000,000.

2. While it is admitted that $3,500,000 was appropriated for the Palisades Interstate Park in 1926 it is contended and the Court below has decided that no part of this sum was ever available for the taking of this property except by condemnation (R., 93).

Appellants are as disingenuous in stating "the bill of complaint does not allege that any part of the $3,500,000 had been expended before the entry and appropriation" (p. 62) as is the affidavit of White (R., 79) in alleging, *on information and belief,* although president, that his board had on hand moneys, securities and other properties of a value in excess of $500,000. If this were the fact only an exact statement would suffice to make the statement material.

There is throughout appellants' brief an effort to create the impression that $3,500,000 is available to pay

for this property. The truth is stated once by appellants (p. 10) where it is conceded that before any of the $3,500,000 can be spent it must be allocated to a particular project by approval of the State Council of Parks, Governor and legislature Chairmen and that only $600,000 was so allocated.

3. The Bill merely alleges the fact that certain state officers went through the acts prescribed for an allocation (par. Fourteenth, R., 6).

Value having been alleged in the bill at $3,000,000 necessarily $500,000 or $600,000 is not an adequate provision. Appellants now call it merely a tentative preliminary estimate. Elsewhere, perhaps unconsciously and certainly inconsistently, they have conceded it is all they have because it is all that has been allocated under Chapter 16 of the Laws of 1926.

4. The invalidity of Chapter 75, Part V, Laws of 1928 is determined by decisions of the Court of Appeals whatever the appellants bring themselves to say to the contrary.

We are not referred to the portion of the Bill of Complaint which "shows that the Attorney General * * * joins with all the other appellants in asserting the validity of the entry and appropriation" (p. 64). He is in fact joined as defendant because Section 68 of the Executive Law of the State authorizes his appearance in cases involving the constitutionality of an act of the legislature (R., 87).

He filed no answering affidavit and with the Conservation Commissioner made a separate motion to dismiss (R., 80) joining later in this appeal (R., 97).

The decision in *County of Albany* vs. *Hooker,* 204 N. Y. 1, 19 does not make the Attorney General the only person who can question the legality of an appropriation act. The late Chief Judge, to whose concurring opinion appellants refer, merely says an action to restrain illegal expenditures of state moneys can be brought by the people of the state alone.

Under Section 59, sub. 7 of the Conservation Law[1] the comptroller must issue his warrant and the state treasurer honor it. The Constitution forbids these officers from so doing whatever the position of the Attorney General in this suit and certainly there is nothing in what the late Chief Judge Cullen ever wrote to discourage a very strict obedience of the constitution.

5. The Bill of Complaint alleges:

> "No sum whatever has been appropriated for the acquisition of plaintiffs' property by entry and appropriation" (R. 7).

It is then alleged that its value greatly exceeds an amount invalidly appropriated (R., 8).

The affidavit of White after stating his belief "that value of the property, as such, is not an issue in this litigation" (R., 62) made an indefinite statement that the Commissioners "came to the conclusion" that the property was worth less than $600,000 and "thereupon sought and obtained an allocation from the bond issue moneys of $600,000" (see Exhibit G attached to the plaintiff's moving papers) (R., 63).

Apparently the argument in the District Court led affiant White to a different conclusion and value being an issue he made another affidavit (R., 78). This was his opportunity to tell the Court exactly what the Commission, of which he has been a member since its inception and president since 1921, has at its disposal. Although in his own words "thoroughly acquainted with the history and activities of the Commission" (R., 58) he is only able to say the Commission "on October 11, 1928 * * * had on hand * * * moneys, securities and other properties * * * which I am informed and believe were of a value in excess of $500,000."

Such candor and complete disclosure did not affect the result below.

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[1]Appellants' Appendix, pp. 26, 27.

Appellants relied entirely in the first instance upon a pledge of state credit. They now seek to add other excuses equally ineffective.

POINT VI.

Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals.

The position of the appellants is that the uniformed police of the Commission may oust the owner of land and compel him to bring an action of ejectment against their superiors.

The title of Sparkhill Realty Corporation on October 11, 1928 is conceded as well as the lease to Standard Trap Rock Corporation, its possession and the extensive preparations of the latter and the fact that one month before appropriation the latter was about ready to commence operations (Appellants' Brief, p. 6).

The illegality of the Commission's acts has been shown in the preceding points.

The affidavit of White (R., 61) states that before the appropriation of the property efforts were renewed to agree with the owner and conversations were had between counsel. Such is the fact. Negotiations were renewed in August 1928 after, as is undenied, the Commission had stimulated the Land Board to its unlawful interference with dredging as a preliminary to such renewal (R., 40).

On September 29, 1928 while these negotiations were still pending the Commission sought and obtained approval of estimates and maps by the State Council of Parks (Exhibit B to Bill of Complaint, R., 34). The approval recites the project was also submitted to the Governor and legislative Chairmen and had received their approval.

On October 8, 1928 the original approval was signed by the Director of the budget and filed with the State Comptroller (R., 55).

All this took place before the Commission met on October 9, 1928 and resolved to take the property by appropriation and entry (R., 61, 64).

When the Commission met everything was set for condemnation "under the provisions of chapter one hundred and seventy of the laws of nineteen hundred, as amended". The documents before the Court show the steps taken were "pursuant to the provisions of section 4 of chapter 16 of the laws of 1926" (R., 34).

Then the Commission met and adopted another method of taking by resolution (R., 64):

> "Resolved, that pursuant to the provisions of Chapter 242 of the laws of 1928 and the other applicable provisions of the laws of the State of New York, the Commissioners of the Palisades Interstate Park enters upon, takes possession of and appropriates, in the name of the People of the State of New York".

This method of taking required a separate approval of the Governor under Section 59 the Conservation Law[1] his former approval being for condemnation under Section 4 of Chapter 16 of the laws of 1926.[2]

So on October 10, 1928, the day after the Commission met, a second approval of the Governor, this time pursuant to Section 59, was obtained, (R., 72) and on the same day that of the Conservation Commissioner (R., 73), expressly excluded as we have shown by Section 662 of the Conservation Law where acquisition is pursuant to chapter sixteen of the laws of nineteen hundred and twenty-six.[3]

Had these appellees, distrusting the Commission's observance of its flag of truce, (Exhibit 2, Affidavit of

[1]Appellants' Appendix, p. 23.
[2]Idem, p. 48.
[3]Idem, p. 27.

White, R., 75-76), commenced a suit before October 11, 1928 they would have been met by the rule that courts will not pass upon the validity of a law upon the mere suggestion that it is void and that possible action may be had under it and in advance of any proceedings had or threatened by the officials who, if the law were valid, would be called upon as authorized to act.

People of N. Y. v. *Canal Board of N. Y. et al.*, 55 N. Y. 390, 397.

Prior to its meeting the acts of the Commission in obtaining approvals pursuant to Chapter 16 of the laws of 1926 if known would have indicated an intention to proceed lawfully by condemnation.

Before the service of the notice of appropriation, by virtue of which if effective title passes to the state and which was the first knowledge appellees had of the move against them, the suit would have been premature. Afterward appellants say it is too late the suit is in effect ejectment.

There was therefore no time before this suit, according to appellants' theory, when the Commission either by concealment or celerity could not have defeated a suit in equity.

Equity will not allow appellants to hold a possession so obtained. When a state officer slides for a base in this fashion the officer may land on the base but he cannot hold it in the name of the state. The bill of complaint rests upon an absence of lawful power to enforce a statute and an abuse of authority and its merits must be determined accordingly; it is concededly not a suit against the state.

Goltra v. *Weeks*, 271 U. S. 536, 545.
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 621.

Appellants contend (Brief, p. 66) that the relief asked under the guise of an equity bill and prayer for injunction is nothing more or less than the relief a judgment in ejectment would give and that the equity jurisdiction of the Federal courts does not extend to such a case.

It is established by the decisions of the Court of Appeals of New York which follow that a peculiar jurisdiction exists in equity to prevent illegal acts of public officers under color of right which injuriously affect the property rights of individuals.

Assignment of error 4 (R., 99) read:

> "4. The Court erred in not dismissing the bill of complaint on the ground that the suit is in reality against the State of New York and with respect to property in its possession, and that the State has not given its consent to be sued."

Appellants have withdrawn this assignment of error, (Brief, p. 17). It is the only assignment of error which raises the question of possession. Errors 28 and 30 (R., 103) raise only the question of title, in other words the effectiveness of the notice of appropriation. The appeal consequently raises no question of the Eleventh Amendment and *the suit is no longer possessory but entirely concerned with the effect of a notice* served on appellees as the individual act of the Commissioners and without effect by reason of its illegality.

Since the peculiar jurisdiction of equity under the law of the locality to restrain public officers is thoroughly established by the decisions of the highest court of the locality, the case becomes one for the application of the rule in this Court that

> "A party, by going into a national court, does not, this Court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; the wise policy of the constitution gives him a choice of tribunals."
>
> *Smith* v. *Reeves,* 178 U. S. 436, 444.

In a similar case which went to Court of Appeals it was written:

> "In the case at bar the complaint and the proofs establish a cause of action against individuals who have mistakenly and unlawfully assumed to act under color of law, so that in its simplist analysis the ultimate question is, whether the plaintiff could maintain this form of action against the defendants if they had professed to enter his premises simply as individuals. As that question can have but one answer we conclude that the judgment of the courts below must be reversed and a new trial had, with costs to abide the event."
>
> *Litchfield* v. *Bond,* 186 N. Y. 66, 85.

There plaintiff sued to restrain the state engineer and his assistants from entering, or doing acts on his premises, in effectuating an act of the legislature relating to the establishment of county lines.

The defendants had there as here already entered upon plaintiff's land and had cut a slash through his woodlands.

Flood v. *Van Wormser,* 147 N. Y. 284, 289.

There defendant as commissioner of highways was enjoined from removing plaintiff's house as encroaching upon the highway.

The Court of Appeals said:

> "In *People* v. *Canal Board* (55 N. Y. 390), it was held that while a court of equity has no supervisory power or jurisdiction over public officials, or public bodies, it will exercise its peculiar jurisdiction over them to prevent some illegal act, under color or claim of right, affecting injuriously the property rights of individuals. It is under one of the heads of equity jurisdiction that the court interferes to prevent injury to land, if the trespass will be attended by irreparable mischief and plaintiff may be unable to obtain relief at law."
>
> *The West Point Iron Co.* v. *Reymert,* 45 N. Y. 703.

There the rule was established in New York that plaintiff's title being already established as in the present suit an action at law for that purpose is unnecessary and equity will grant injunctive relief to prevent an injury which is not a mere fugitive trespass.

Baron v. *Korn,* 127 N. Y. 224, 228.

This was an action to restrain the maintenance of a wall, compel its removal and for damages.

The Court of Appeals said:

> "Assuming plaintiff's title to be established, the authority of the court in a suit in equity to interfere and prevent an appropriation of their lands to the use of another for building purposes cannot be longer questioned, not only for the purpose of avoiding multiplicity of actions, but also because they were without adequate remedy at law."
>
> *Bloomquist* v. *Farson,* 222 N. Y. 375.

This recent decision of the highest court establishes that in New York adequacy of legal remedy is an affirmative defense which must be pleaded and cannot be raised

upon a motion to dismiss the complaint. No answer is in the record and we assume appellants will concede that in the answer filed after the submission below the only plea of this nature is an allegation that appellees may obtain a judgment in the Court of Claims.

The same jurisdiction to restrain public officers acting under color of right is recognized in the federal courts.

Osborn v. *U. S. Bank*, 9 Wheat 738.

There this Court recognized the necessity of jurisdiction to restrain a public officer having plaintiff's property in his possession unlawfully from acts which would result in its passing beyond the power of such officer to restore.

The Court said of tax money unlawfully collected and in the possession of defendant:

> "In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party since his principal is not amenable to the law." (p. 844).

In the present case the property and the plant are taken in the name of the People of the State for a public park. It is stated in the affidavit of White (R., 59) that the lands acquired by his Commission "have been converted into great public parks which now serve the recreational needs of millions of persons annually".

The statements of appellees that their property had a very great earning power is confirmed by the allegation in the affidavit of White (R., 58) that quarries along the Hudson taken by purchase or condemnation "were earning large profits."

The monopoly of the New York Trap Rock Company in the New York market is not denied nor is the quotation from its president's letter of December 15, 1926 showing the phenomenal increase in use of crushed stone and the great value of appellees' property disputed (R., 37).

Concededly appellees were about to commence operations. They find themselves deprived of their property "daily suffering great loss from the continued unlawful occupation of their property, deterioration of buildings and machinery and impossibility of operation" (Bill, par. Twentieth, R., 8). The Commission "may at any time enter upon the destruction and demolition of the plant" (R., 44) which it took one year to erect at a cost of one million dollars (R., 40) and which it would take as much time and probably more money to replace. Meanwhile appellee Standard Trap Rock Corporation has earned no return on its capital and paid no dividends (R., 44). If the property is destroyed it is not at all likely new capital will be forthcoming to replace the plant so that success without injunctive relief will not stay execution of the death warrant.

The land taken for a park will meanwhile be overrun by some of the millions whose "recreational needs" (R., 59) will be satisfied only when every last vestige of moveable property has disappeared from the lands made accessible to them by automobile credit associations and individual suits against whom, if possible, would fill the courts fuller than the Eighteenth Amendment.

Under such circumstances the federal courts grant mandatory injunctions restoring possession.

> *Pokegama S. P. Lumber Co.* v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528; on final hearing 96 Fed. 34.

There at the outset possession was restored to a lessee by a temporary restraining order in a suit against the lessor.

The Court says:

> "It is contended that the injunction although preventative in form was mandatory in effect, its execution resulting in a change in the status of the parties. The contention assumes that the Court will recognize the respondent as asserting at the

> time the bill was filed a claim of possession to the property under color of right to such possession and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction. Pom. Eq. Jur. 2d Ed. §98" (p. 533).

Answering the contention also made here that the action should be at law the Court proceeds:

> "If defendant's possession is but an interruption of the prior possession of complainant whose right is clear and certain an injunction may be granted without compelling complainant to establish his title by an action at law. The interference in such cases rests as in cases of nuisance upon a clear and certain right to the enjoyment of the subject in question and an injurious interruption of that right which upon just and equitable grounds ought to be prevented. High, Inf. §356 (p. 537).
>
> *Slaughter* v. *Mallet Land & Cattle Co.*, 141 Fed. 282, 288.

Bill in equity to prevent trespass and to remove cloud. On demurrer a plea to the jurisdiction by reason of adequate remedy at law overruled and order affirmed on appeal.

The Court says:

> "The attempts of Slaughter, no matter how successful, to take forcible possession of the land cannot be recognized as giving him actual and lawful possession nor be made the foundation of any right between him and complainant from proceeding with a bill to remove cloud with preventive re-

lief against the attempted destruction of title and possession".

Love v. *Atchison T. & S. F. Ry. Co.*, 185 Fed. 321, 333.

This case recognizes equitable jurisdiction in suits against public officers in the words of SANBORN, Circuit Judge:

> "Moreover in truth the purpose and effect of these injunctions were to restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits. Plenary power is conferred and the undoubted duty is imposed upon a court of equity to issue its injunction for that purpose."

Percy Summer Club v. *Astle*, 145 Fed. 53.

There the citizens and residents of New Hampshire claimed a public right to enter upon a lake to fish just as in the present case it is claimed the appellees' property has become a public park. An injunction was denied upon a finding of such public right but equitable jurisdiction was first sustained to prevent such entry if unlawful.

The Court said:

> "Under these circumstances, having in view especially the intervention of the state of New Hampshire in this litigation, it is evident that although the respondents might ordinarily be regarded as mere trespassers, yet here they may be said to represent a class; that class being all the residents of New Hampshire who may desire to fish in ponds or lakes of the character of that in dispute here. Therefore the case is sufficiently analogous to a bill of peace to justify the intervention of a court of equity, if other things are sufficient therefor, because it is very plain that ac-

> tions at law would not give the complainant adequate relief."

The Circuit Court of Appeals affirmed the order after an exhaustive review of fishing rights in the state but upon the subject of equity jurisidiction wrote (163 Fed. 1):

> "At the argument the defendants contended that the bill should be dismissed because the complainant had an adequate remedy at law. We do not find this objection stated anywhere in the pleadings and we agree with the learned judge of the court below that the case was not without the jurisdiction of the Circuit Court by reason of a want of equity."

Finally in many varieties of action it is established in this Court that violation of the federal constitution by state officers may be enjoined.

> *West. Un. Tel. Co.* v. *Andrews,* 216 U. S. 165.
> *Big Six Development Co.* v. *Mitchell,* 138 Fed. 279.

> "We think, both upon reason and authority, that in a case such as this, where the injury is to the use (that is to say, where irreparable mischief is being done or threatened, going to the very substance of the estate) a court of equity has jurisdiction, not only for the purpose of restraining waste or threatened trespass, but, having acquired jurisdiction for that purpose, it may also proceed to settle the question of title and to remove the cloud; and this was the view taken by the Circuit Court."

This opinion is cited with approval in *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 691.

> *United States Freehold Land & Emigration Co.* v. *Gallegas,* 89 Fed. 769, 773.

SANBORN, Circuit Judge, wrote:

> "A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated because constantly recurring actions would be more vexatious and expensive than effective."

The cases cited by appellants lack two elements here present, irreparable injury and the unlawful act of a state agency. Those upon the jurisdiction of a federal court in ejectment would have been germane had these appellees brought such an action.

We are accused (Appellants' Brief, p. 70) of having proceeded in the federal court because of two decisions in the appellate courts of New York.

In *Pauchogue Land Corp.* v. *Long Island State Park Commissions,* 278 U. S. 657 this Court denied certiorari in January 1929 while the present suit was commenced March 19, 1929 (R., 3). Appellees certainly did not enter the federal court to avoid that decision.

In *Flagg* v. *Moses,* 132 Misc. 494; 225 App. Div. 887, the opinion of the Special Term was delivered after a trial of the action to restrain the defendant from the use of the lands in question as a public park and for damages. The record shows and the opinion relies upon the fact that testimony of real estate brokers familiar with values in the locality was produced by the defendants and sustained the estimate of value upon which the sum of money available to pay compensation was based. The Court says (p. 496):

> "If the opinion of these men is to govern, the sum available was reasonably adequate. In fact more than sufficient to pay for the land taken."

In the present case the value alleged and supported by appellees' affidavits is not met either with a denial or conflicting proof by affidavit.

Moreover in the *Flagg* case, after considering the question of value, the Court proceeded (p. 497):

> "The foregoing is sufficient to defeat the plaintiffs' cause of action, but still another element prevents them from recovery.
>
> The plaintiffs, in order to save themselves from being barred in the Court of Claims by the two years Statute of Limitations, shortly before such statute would apply, filed their suit in the Court of Claims, asking that court to fix the value of the property taken, and to direct the State Treasurer to pay it to them.
>
> The weight of authority upholds the defendant's contention that the submission by plaintiff to the Court of Claims is a bar to a recovery here. The cases in support of this contention hang upon the decision in Great Falls Mfg. Co. *v.* Attorney General (124 U. S. 581). Under this and other decisions the proceeding in the Court of Claims constitutes plaintiffs' only remedy".

Appellees instituted this suit in the District Court of the United States rather than in the state courts because they were advised such was their right and that it was "a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States and sustained by the opposite construction."

Osborn v. *U. S. Bank*, 9 Wheat 738.

POINT VII.

The interlocutory decree is proper and grants proper relief.

The affidavit of White (R., 57) states:

> "Though the questions involved are almost wholly questions of law, certain facts as to the *background* of this litigation should be presented to the Court."

None of this background is disputed. It is the same background described by the appellees and in turn denies none of their allegations.

The case resolved itself entirely into a question of law.

Under Section 266 of the Judicial Code:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court."

Under the practice in the Southern District the same three judges would sit at the final hearing.

Having reached the conclusion shown in their opinion it would have been a denial of justice to have restricted the decree to a preservation of conditions existing after the unlawful appropriation.

The argument below took place on April 6th, 1929 (R., 1). Printed briefs and reply briefs were filed and the Court had the matter under consideration two months after which its opinion was filed June 7, 1929 (R., 97).

Under the opinion nothing remained to be determined on a final hearing and the exact value of appellees' property had become immaterial in view of the Court's conclusion that no funds had been appropriated for a taking in the manner chosen by the Commission.

Instead of going through the idle ceremony of a trial both appellants and appellees joined in a motion to advance and the argument in this Court has been delayed only by illness of counsel with the appellants.

Exactly the same situation exists which would have been presented had appellees at once brought the case on for trial with the result already determined in their favor and an appeal had then been taken to this Court.

The present case is exactly within the rule quoted by appellants from *Cavanaugh* v. *Looney*, 248 U. S. 453, 456

since the case is free from doubt and the injunction necessary to prevent great and irreparable injury.

On the contrary the present case is not one where defendants intend to institute condemnation proceedings in a State Court, as in the *Cavanaugh* case, in which the objections to the validity of Chapter 75, Part V, of the laws of 1928 assuming to reappropriate might, after the expiration of eighteen months, terminate the proceeding. Here there will be no proceeding in any State Court.

Under all these circumstances the decree was proper in form because properly in substance a final decree rendered by the trial Court after it had determined all the issues.

Conclusion.

In conclusion appellants argue that if the state's so-called promise to pay is insufficient in administrative eminent domain the state can "never employ the entry and appropriation process."

Section 50 of the Conservation Law[1] shows the legislature does not intend the department shall exercise the power except "when moneys have been appropriated therefor."

Worse things might happen than that commissions' wings should be so trimmed and the provisions of all comparable statutes show an intention on the part of the legislature to obey the state constitution[2] and curb the activities of the state agencies which may think they have power to subject the state to obligation beyond legislature appropriation.

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[1]Appellants' Appendix, p. 22.

[2]For example especially §662 of the Conservation Law providing appropriation of bond moneys approved by popular referendum shall not be affected thereby (Appellants' Appendix, p. 27).

It is stated by appellants that "there is notoriously a wide discrepancy between the owner's estimate of the value of property in eminent domain and the estimate of the State's officials" (Appellants' Brief, p. 81).

Nevertheless the Condemnation Law, Section 24, quoted at page 24, supra, makes the amount a condemnor, including the state, must deposit if possession is taken before payment, the value put upon the property by the owner.

For twenty eight years this Commission got on very nicely without any such power and according to the affidavit of White (R., 59) preserved the scenic beauty of the Palisades and acquired lands for a public park large enough to serve millions of persons annually. Only two million is over five thousand a day and all this was done under a statute which makes payment a condition of possession (L. 1900, Ch. 170).

What great emergency exists to necessitate a power to take on credit when the Commission has been so successful on a cash basis? Certainly it cannot truthfully be said that it was necessary to the proper performance by this Commission of its functions after twenty eight years of successful operation under a statute which protects both public purse and land owner.

The decision of the statutory court upheld here will not end the practice of eminent domain by appropriation and entry as appellants cry (Brief, p. 80). It merely holds this Commission within the bounds prescribed uniformly by the courts of the state and United States.

Appellants' brief concludes with the statement that entry and appropriation had its origin in the Erie Canal Act of 1817 and that the decision of the Court below, were it to stand, would mean the end of the practice.

It is therefore interesting and important to find the Erie Canal Act, chapter 262 of the Laws of 1817, providing in section 3 for appraisal by commissioners of damages and then containing the words:

> "And the Canal Commissioners shall pay the damages so to be assessed and appraised and the fee simple of the premises, so appropriated, shall be vested in the people of this State."

Chancellor Kent in *Rogers* v. *Bradshaw*, 20 Johns 735, 741 said:—

> "Under the act of 1817, it was, also, provided, that where lands were taken, as being necessary for the prosecution of the improvements, the fee should vest in the state on being paid for."

The practice of entry and appropriation in its origin therefore required payment before vesting of title.

The interlocutory decree should therefore be in all respects affirmed.

Respectfully submitted,

JACKSON A. DYKMAN,
Counsel for Appellees.

WILLIAM N. DYKMAN,
on the Brief.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 336.—October Term, 1929.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, et al., Appellants, *vs.* Sparkill Realty Corporation and Standard Trap Rock Corporation.	Appeal from the District Court of the United States for the Southern District of New York.

[February 24, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

This in form is a suit in equity against the members of the Board of Commissioners of the Palisades Interstate Park, appointed pursuant to a statute of the State of New York, the Attorney General and the Commissioner of the Conservation Department of the state. The bill was filed March 19, 1929, and alleges that the Sparkill Realty Corporation is the owner in fee of lands lying within the southern district of New York, of which the Standard Trap Rock Corporation is lessee. The lands contain valuable deposits of "trap rock"; and the Standard Trap Rock Corporation, in preparing to develop the deposits, contracted for the erection and equipment of a plant, not adapted for use elsewhere, thereby subjecting itself to liabilities exceeding $1,000,000.

While this work was in progress, estimates and maps, as required by state law, for the acquisition of these and other lands for a state park, were approved by the board and certain state officers. Notice was served on appellees that a description of the lands, certified as correct, had been filed with the Secretary of State; and that the lands had been appropriated by the people of the state for public and state park purposes, pursuant to the state statutes. Thereupon, the bill alleges, the Board of Commissioners on October 11, 1928, "wrongfully entered upon the said real property of plaintiffs (appellees) and converted the personal property thereon to their own use and have since remained in

possession of said real and personal property and prevented its use, enjoyment, occupation and operation by plaintiffs for any purpose to plaintiffs' great and continuing damage."

It is further averred that the sum of $500,000 was allocated to the acquisition of the property, but that the value of the property exceeds $3,000,000; that appellees are suffering daily loss from the "continued unlawful occupation of their property", the aggregate sum of which will be such that the damage will be irreparable and destructive of appellees' property; and that, therefore, they are without adequate remedy at law.

The prayer is, that the acts of the board and state officers, and the statutes of the state purporting to authorize them, be declared invalid as violating the Fourteenth Amendment and other provisions of the federal Constitution, as well as a provision of the state Constitution; and that appellants be enjoined from attempting to enforce the provisions of the statute, notice, description or certificate, or proceeding against appellees at law or in equity to compel compliance with, or inflicting or recovering any penalty, forfeiture or damage for noncompliance by appellees with the statute, notice, description or certificate, or "from continuing in possession of plaintiffs' said property."

The statutory provisions assailed as unconstitutional are found in §§ 59 and 761 of the New York Conservation Law, L., 1928, chap. 242. Section 761 confers upon the Commissioners of the Palisades Interstate Park power to acquire lands by entry and appropriation in the manner provided for in § 59. Section 59 authorizes the Conservation Department to enter upon and take possession of lands, etc., which, in the judgment of the department, shall be necessary for public park purposes, or for the protection and conservation of the lands, forests and waters within the state. A description of the property to be entered upon must be made and certified, which, together with a notice endorsed thereon that the property described is appropriated by the people of the state, shall be filed in the office of the Secretary of State. A duplicate must be served on the owner or owners of the lands, etc., and "thereupon such property shall become, and be, the property of the people of the state." Provision is made for an adjustment of compensation for the property and legal damages, and the issue of a certificate stating the amount due; which amount shall be paid out of

the state treasury upon the audit and warrant of the Comptroller. It is further provided that any owner may present to the state Court of Claims a claim for the value of the land and damages; and the court is authorized to hear and determine such claim and render judgment thereon. The Comptroller is directed to issue his warrant for the payment of the amount, with interest from the date of the judgment until the thirtieth day after the entry of final judgment; and such amount shall be paid out of the state treasury.

Upon filing the bill it was ordered that appellants show cause before a court of three judges, constituted under § 266 of the Judicial Code (U. S. C. Title 28, § 380), why an interlocutory injunction should not issue. A hearing was had upon affidavits submitted by both parties. The affidavit of James G. Shaw, on behalf of appellees, contains the statement that, acting under the statutory provisions above set forth, the property in question was "appropriated by the people of the state of New York for public and state park purposes with the approval of the Governor"; and that the commissioners "thereafter entered upon and took possession of said property, of which they have since retained possession to the exclusion of the plaintiffs." The affidavit of J. Du Pratt White, President of the Board of Commissioners of the Palisades Interstate Park, sets forth that, after the appropriation papers were served, appellees ceased doing any work on the property; that the contractors and other persons engaged in doing work left, taking their machinery and tools with them, and certain movable property and equipment used or for use in connection therewith was likewise removed from the premises; and that the state, through the commission, had, since October 11, 1928, been in exclusive possession of the property as a state park. These excerpts from the affidavits are not controverted.

Appellants submitted a motion to dismiss the bill on the ground, among others, that it did not state facts sufficient to constitute a valid cause of action in equity against the defendants. The court below denied the motion to dismiss and granted an interlocutory injunction in accordance with the prayer of the bill. —F. (2d) —. The state statute was held invalid for the reason that it authorized the taking of private property for public use without just compensation, or making adequate provision for payment thereof. In re-

spect of its denial of the motion to dismiss, the court simply said that the action was not one for ejectment, and cited *Hopkins* v. *Clemson College*, 221 U. S. 636; *United States Freehold Land & Emigration Co.* v. *Gallegos*, 89 Fed. 769.

We do not consider the question of the constitutionality of the state legislation, because it is apparent from the bill and affidavits that the bill should have been dismissed on the ground that appellees had an adequate remedy at law.

The Board of Commissioners, acting for the state, entered upon the lands and had been in the exclusive possession thereof for several months before the filing of the bill, effectively preventing appellees from using, enjoying or occupying the property. The relief sought was to enjoin appellants "from continuing in possession," that is to say, to oust appellants so as to restore the lands to the possession of appellees. It is plain that this is not the office of an injunction. Entry and possession of the lands by appellants and all alleged wrongful acts and proceedings preliminary thereto and in aid thereof had been consummated long before suit was brought, and preventive relief by injunction, consequently, had ceased to be appropriate.

Whitehead v. *Shattuck*, 138 U. S. 146, was a suit in equity to quiet title to real property. Plaintiff was the owner in fee, holding title as trustee. Defendants claimed title and were in possession, openly and adversely. Plaintiff averred that defendants' claim of title was made in fraud of his rights; that the patent under which they claimed was fraudulently made, the land not being subject to entry and patent. Upon these facts, this court held that plaintiff had an adequate remedy at law, and that a suit in equity could not be sustained, saying (page 151):

". . . where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

In *Lacassagne* v. *Chapuis*, 144 U. S. 119, 124, this court said:

"The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by

means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, 2d ed. § 355."

To the same effect is *United States* v. *Wilson,* 118 U. S. 86, 89; *Black* v. *Jackson,* 177 U. S. 349, 361. In the latter case the rule was applied, nothwithstanding the financial inability of the defendant to respond in damages.

The two cases cited by the court below are not in point. In *Hopkins* v. *Clemson College, supra,* plaintiff sued for damages caused by erection of a dike on one side of a river, which had the effect of submerging his lands lying wholly upon the other side. The injury was "continuous from day to day and year to year." The prayer was for damages, and abatement and removal of the dike. The injury was in the nature of a continuing trespass; possession was neither involved nor sought.

In *United States Freehold Land & Emigration Co.* v. *Gallegos, supra,* the bill was to enjoin the diversion of water to the injury of complainant's lands, constituting a continuing trespass. The ownership or possession of the lands was not in controversy.

The present case is entirely different. Here the purpose of the suit is to eject appellants from lands which for five months had been and still were in their exclusive possession, under claim of right and in pursuance of a statute which gives color of title notwithstanding the challenge to its constitutionality. See *Doe on dem. of Trustees, etc.* v. *Newbern Academy,* 9 N. Car. 233. That challenge does not require resort to a suit in equity. It will be open for determination in an action at law which is the appropriate remedy.

The decree below must be reversed and the cause remanded with instructions to dismiss the bill, but without prejudice to an action at law in a court of competent jurisdiction.

Section 274a of the Judicial Code, Title 28, § 397, U. S. C., and Rule 22 of the Equity Rules, 226 U. S., appendix, 6, contemplate that where what is really an action at law is erroneously begun as a suit in equity the same may be transferred to the law side of the court and after appropriate amendments may be prosecuted to a

judgment as if originally begun on the law side. See *Liberty Oil Co.* v. *Condon National Bank,* 260 U. S. 235; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, 76; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 689, 692. But both the statute and the equity rule refer, and can only refer, to cases of which the court would have jurisdiction if they were brought on its law side. This is not such a case. The parties are citizens, not of different States, but of the same State. And if the plaintiffs were suing at law in ejectment their complaint, if confined to an orderly statement of such a cause of action, without anticipating possible defenses, would not present a case arising under the Constitution, or a treaty or law of the United States. *Taylor* v. *Anderson,* 234 U. S. 74. Thus the case, if brought as an action at law, would be one of which a federal district court would not have jurisdiction. In this situation no other course is open than to direct that the bill be dismissed and leave the plaintiffs free to sue in a state court, if they be so advised.

Decree Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.